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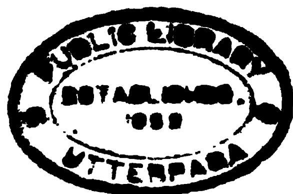
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THE

LAW MAGAZINE AND REVIEW.

No. CCCXXX.—NOVEMBER, 1903.

I.—THE ATTITUDE OF THE BRITISH GOVERNMENT TOWARDS LEGAL CONFERENCES.[1]

NATIONAL character requires, and is expressed in, national law.

Nations will never grow entirely alike, and while they remain unlike in character there will be points in which they will be unlike in law.

The inconveniences which this dissimilarity causes to the traveller, the emigrant, the merchant, and the shipowner, must be borne sometimes, great as they are. But there are many cases in which they may be removed and uniformity of law may be achieved without detriment to national character or institutions; and it has been the glory of the diplomacy of the last fifty years to effect some of these removals and to make some steps towards uniformity.

Perhaps the first step in this direction was the Latin Monetary Union, which has been followed by the Scandinavian Monetary Union.

Then came the Postal Union, the International Convention for the Protection of Submarine Telegraphic

[1] *The desirability of the British Government taking part in the Legal Conferences at the Hague on Private International Law, and in a Conference for securing unity of Maritime Law.*

A Paper read by the Hon. Sir Walter G. F. Phillimore, Bart., D.C.L., a Judge of the High Court of Justice, at the Antwerp Conference of the International Law Association, September, 1903.

Cables, the International Convention for the Protection of Industrial Property, 1883, 1884, the International Union for the Protection of Literary and Artistic Works, 1886, and the Convention on Transportation by Rail, made at Berne in 1890. Most, if not all, of these Conventions were the fruit of previous International Diplomatic Conferences. Great Britain is a party to many of them, and has found the best results from her participation.

The earlier International Rules for the Prevention of Collisions at Sea were arrived at without Conference or general Convention, other nations gradually adhering by treaty or diplomatic acts to the British rules. But when these rules required amendment and amplification, a Conference of all the Maritime Powers was held at Washington in 1889.

The Fisheries in the North Sea were regulated in 1883 by a Convention between the several States interested.

The Republics of Spanish and Portuguese America held a Congress at Monte Video in 1889, the result of which has been an agreement between these States with respect to several branches of law.[1] I understand that this agreement has not been expressed in one common Convention, but by separate treaties between the several States. The particular method, however, by which agreement has been attained is of no importance.

Judge Baldwin, our former President, has in two valuable articles in American periodicals,[2] drawn attention to this Congress, its important results for the States which took part in it, and the example which it has set to the nations of Europe.

In 1900, a social Conference somewhat informal in character, but held at the invitation of the Spanish Government and attended by representatives of fifteen Spanish American

[1] Clunet, *Journal du Droit International Privé*, 1896, pp. 440, 699; 1897, p. 895. [2] *Yale Review*, May, 1903; *Yale Law Journal*, June, 1903.

States, took place at Madrid.[1] At this Conference resolutions were passed adopting in the main the conclusions of the Congress of Monte Video; and it seems that Spain has acceded, or is about to accede, to these conclusions.

In other directions an approach towards international agreement had been made as early as 1884. Our Association was the mover. In that year it addressed the Italian Government requesting it to take the initiative in convening a Conference to consider the question of an agreement for the execution of foreign judgments. The Government of Italy accordingly addressed a preliminary invitation, which was favourably received by many States including Great Britain. It was proposed that there should be a Conference at Rome in 1884; but an outbreak of cholera caused a postponement, and the Conference was never held.

In 1885 the Italian Government proposed to the other States to fix certain rules of private International law by treaty. The answer of Great Britain to this proposal went into some detail as to the matters in which the Executive could bind the nation without recourse to Parliament.[2]

Here again further progress was not made. But in 1893 a Conference assembled at the Hague at the invitation of the Government of Holland, and under the presidency of that eminent statesman and jurist, Mr. Asser.[3] A second Conference was held in 1894,[4] and a third in 1900.[5]

At these Conferences I regret to say that Great Britain was not represented. The motives for her absence will be discussed later.

[1] *Revue Générale, du Droit International Public*, 1902, p. 288.

[2] Clunet, *Ibid.*, 1886, p. 35.

[3] Clunet, *Ibid.*, 1894, p. 1; Martens, *Récueil de Traités*, Vol. XIX, p. 424

[4] Clunet, *Ibid.*, 1895, p. 465; Martens, *Ibid.*, Vol. XXI, p. 113; Mr. C. D. Asser, Paper read at Glasgow Conference of this Association, 1901.

[5] Clunet, *Ibid.*, 1901, p. 1. While this paper was being read, M. Beernaert, our President, called my attention to another Continental Conference, from which sprang an uniform law as to Bills of Exchange.

These Conferences have borne fruit in a series of Conventions between the nations represented.[1] Their subject-matter may be classified into two divisions.

The first division embraces the reciprocal execution of foreign judgments, and agreements by each State to raise the citizens of the other contracting States to the same position and privileges in its Courts as those possessed by its own "nationals." The second division recognizes the diversity of national laws as to marriage, both in respect of capacity to contract and in respect of necessary forms, as to divorce and separation, and as to the guardianship of minors, which diversity it makes no attempt to reduce. Recognizing this diversity, it comprises a series of international rules determining which national law is to be applied, in any case.

Great Britain has not been present at any of these Conferences, nor has she been a party to the Conventions. There seems no valid reason for this abstention. It is true that the treaty-making power of the Executive in Great Britain is, while absolute and unconditional within its limits, contained within narrower limits than that of the Executive in the Continental States of Europe and the United States of America. In other words, no change of private law can be made by treaty, unless Parliament agrees to carry it out. I can understand our Government declining to enter a Conference without making this quite plain. But why, having made it plain, our Government should not enter a Conference with the object of recommending to Parliament such changes of the law as should commend themselves, I cannot conceive.

Moreover, it appears to me that in very many of the matters which have been the subjects of these Conferences and this Convention, the rules adopted have been practically

[1] Clunet, *Ibid.*, 1899, p. 626; 1901, pp. 1, 231, 918; Martens, *Ibid.*, Vol. XXIII, p. 398; Vol. XXV, p. 217; *Revue du Droit International*, 1902, p. 485.

if not formally the rules adopted by Great Britain, and that all that the Continental nations would require would be some formal statement by our Government that such was our law, or possibly what we call in Great Britain a Declaratory Act, a statute declaring, for the satisfaction of foreign nations and to remove all doubt, that such and such was the law of Great Britain; it being remembered that our substantive law is not expressed in a Code or Codes.

With regard to Procedure we have Codes. I say Codes because the rules of the Supreme Court of Judicature in England differ or may differ from those of the like Court in Ireland, and certainly differ in some respects from those of the Court of Session in Scotland, and those of the Courts of some of our Colonies. But still we have what are equivalent to Codes of Civil Procedure; and these Codes have this advantage, that they can be altered by the Rule Committee of Judges, or some similar body, with the consent of the Crown, and have only to be laid before Parliament for its approval, becoming law unless disapproved within a certain time, so that they are much more easy of amendment.

I know of no matter of agreement between the different nations which have been parties to the Hague Conferences to which there would be any real difficulty in getting the consent of Great Britain. In most matters, both those of substantive law and those of Procedure, the Conventions have agreed to that which has been already established in Great Britain. Where there is apparent disagreement I believe it is more of language or of form than in substance.

It is to be remembered that the general rule of British law is that Acts of Parliament conferring privileges apply to foreigners temporarily or permanently resident in the country, as much as to subjects. For instance, the Poor Prisoners Act, 3 Edw. VII, c. 38, just passed, could and would be used on behalf of an accused foreigner.

For these reasons it seems much to be regretted that Great Britain has not been a party to these Conferences, and shows no intention of attending future ones.

There is yet another matter as to which much complaint —and I must say well-founded complaint—has been made of the aloofness of Great Britain.

The Comité Maritime International, which has its seat in this City, has laboured to procure agreement as to many principles of Shipping law. The result of its meeting at Hamburg last year was that Draft Treaties, (a) as to an uniform law of Collision, (b) as to an uniform law of Salvage, were agreed upon almost with unanimity by the distinguished jurists, practical shipowners and men of business who were present, or were represented, at this Conference.

The Bureau of the Comité brought these treaties to the knowledge of the Ministers of H.M. the King of the Belgians, who have been good enough to take them into their consideration and to correspond thereon with the Governments of other nations. It is understood that Great Britain has hitherto declined to enter upon any consideration of these treaties. I understand, and I sympathise with the disappointment of the Comité Maritime, and the annoyance of Continental nations, at this *non possumus* attitude. The attitude is not only churlish, but may even seem ridiculous, when one recollects that the Draft Treaty on Salvage embodies the English law without substantial, I believe even without formal, modification: while there are only three modifications of English law in the Draft Treaty on Collisions; and only one of these is likely to give rise to dispute.

To this last modification—in cases where both ships are in fault—it is known that I have been opposed; as I am also opposed to a proposal as regards the limitation of liability of shipowners, which has passed several Conferences, though

it is not included in the Draft Treaty on Collisions. But neither of these are matters *de fide*. The first, at any rate, is one which Great Britain might accept in return for the many concessions to her views. And in any event there was, as far as I can see, no reason why, with proper reservation if need be so as to prevent disappointment, she should decline to be a party to a diplomatic Conference, such as that which passed at Washington the Regulations for Preventing Collisions at Sea, to which Conference these draft treaties might be submitted, and from which ultimately some Convention, even if not all embracing, might emerge.

Perhaps the present Conference may desire to express its opinions on this matter by means of a resolution or resolutions.[1]

WALTER G. F. PHILLIMORE.

[1] The following Resolution was proposed by the Hon. Mr. Justice Kennedy, seconded by Professor C. Noble Gregory (Dean of the Law Faculty University of Iowa, U. S. A.), and agreed to unanimously :—

"That this Conference, considering the great importance of the co-"operation of the Government of Great Britain in relation to International "conventions for such purposes as are set forth in Sir Walter Phillimore's "paper, resolves, that it is desirable that the Executive Council should take "steps, respectfully to lay before the British Government the points dealt "with in that paper, together with this Resolution, and to obtain permission "for the audience of a deputation for that purpose."

The following spoke in support of the Resolution :—

Mr. Carver, K.C. ; Mr. Gray Hill (President Incorporated Law Society, England); Prince de Cassano ; Mr. T. R. Miller (Chamber of Shipping, United Kingdom) ; M. Louis Franck, Antwerp ; Mr. Galbraith Miller, Edinburgh, Mr. K. W. Elmslie, London.

II.—LAWS AND LAW-MAKING.

OF the several aspects of law-making and law-giving, the historical is the most attractive. It would be a pleasant task to review the histories of the nations, select the memorable incidents associated with the declaration of their laws, elaborate the details of each occasion, and present the result to the reader in the form of an essay. The essayist might speak of Solon, the law-giver of Athens, who abolished the harsh Draconian ordinances, and of Lycurgus, who, having established in Sparta, laws which made her citizens models of austerity and frugality, and having bound the people by an oath not to alter them until he should return, went voluntarily into life-long exile, in order that he might insure the permanence of his legislation. Or, turning to the sacred narrative, he might transcribe the awe-inspiring passage in the Book of Exodus, which depicts the delivery of the Hebrew Law in the Wilderness of Sinai, amidst "thunders and lightnings and a thick cloud upon the Mount, and the voice of the trumpet exceeding loud." Or, taking a wider prospect, he might call to remembrance Minos the Cretan, who maintained that the law-giver is the mouthpiece of the Deity, because divine justice is the inspiring source of every true law; Confucius, who laid down those rules of social and moral duty by which, for nearly 2,500 years, millions in China have been governed; Justinian, who directed the compilation of that great body of Roman law, which has for ages been a quarry from which jurists have excavated their fundamental principles; Mohammed, who issued the civil and religious precepts which control the hordes who worship Allah after the fashion of Islam; Napoleon, who devised the celebrated code which is still the basis of the law of France; and many others, who in different ages and climes have declared the laws of nations and regulated the conduct of humanity.

On this occasion, however, we shall put aside those enticing thoughts, and undertake a task which is more useful, if less attractive, than the scheme we have sketched in outline. We propose to discuss general principles rather than particular instances, and to trace the manner in which, irrespective of time or place, every law may be theoretically assumed to take its inception, develop and attain maturity.

It is at the outset desirable that we should arrive at a definite understanding as to what we mean by the expression "a law." Although the term has a particular import in jurisprudence, it is in ordinary speech employed with considerable looseness. We speak with equal readiness of the laws of England, of magnetism, of etiquette, or of fashion; but, although in each of these cases a perception of orderly arrangement underlies our use of the word, that perception falls short of the combination of ideas which make up the juristic conception of a law. The Roman jurists had an advantage in so far as they had two words expressive of law. When they used "jus," they intended to convey the idea of a collective body of law,—as *jus civile*, the civil law, or *jus gentium*, the law of nations; when they employed "lex," they indicated a particular law, and frequently qualified the word with an adjective denoting the author,—as *lex Juliana*, Julian's law, or *lex Fabricia*, Fabricius' law. In the English language we have but one word to express law individually and collectively, and confusion of thought has arisen from the fact that that word has so many different significations. For the sake of freeing ourselves from this confusion we shall examine the five ideas comprehended by the term "law" in its juristic sense. These ideas may be briefly characterised thus:—(1) Absoluteness of command; (2) Generality of application; (3) Regulation of human conduct; (4) Bearing upon social relations; and (5) Recognition by the State.

The first and most important attribute of the conception

termed a law is *absoluteness of command*. A law must be imperative. Human conduct is influenced by many rules which want this attribute. For example, there has come floating down the ages a store of proverbial wisdom which may be applied with advantage in regulating human affairs; but proverbs are not laws. We may say that honesty is the best policy without thereby enacting that a thief shall be punished for stealing. There is not behind a proverb, as there is behind a law, an expressed or implied punishment, or other evil consequence, certain to fall upon the man who refuses to act in conformity with its dictates. This punishment or evil consequence,—the "sanction" as it is technically termed,—is so important an element in the idea of a law, that its absence from any particular rule of conduct reduces that rule to the grade of a mere moral precept, valuable in theory, but feeble in practice.

We further observe that a law must have *general application*. A man, in virtue of some power which he possesses, may have a right to impose upon his neighbour certain rules of conduct to which the neighbour is bound to conform, but such rules are not laws. They are limited in their application to the particular citizen whose actions they regulate, and are not applicable to the citizens in general. We cannot regard any rule as possessing the character of a true law, so long as its application is restricted to certain individuals, and does not extend to the citizens of the State, either as a whole, or in classes or groups.

It is in the third place essential to the conception of a law that it should regulate the *words and actions of human beings*, in other words, their *conduct*. A statute cannot regulate the vagaries of the human will. It is only possible for it to take cognizance of the inward workings of the will when these take effect in acts or words. The unexpressed and unacted thoughts of a man, however wicked they be, are beyond the reach of laws. A man may have resolved to

commit a murder; but, so long as he keeps his intention to himself and does not permit it to appear through his words or actions, the law cannot interfere. Morally the man is guilty: legally he is not guilty. The distinction between Ethics and Law turns mainly upon this,—that the one deals with inward, and the other with outward, acts of the will. It seems superfluous to say that it is the conduct of *human beings* only, which a law can regulate. There are laws which contain provisions affecting various animals, but such enactments are either restrictions upon the right of ownership of human beings as regards such animals, or arise in some other way out of the relation subsisting between human beings and them. It is obvious that the conduct of an animal cannot be regulated by human law.

We have at this stage reached the conclusion that a law must be imperative in its command, general in its application, and operative upon human conduct. The two most difficult attributes still fall to be considered, when we inquire respecting the special affairs or matters, as to which the conduct of human beings are governed by laws. This question may be answered, using a certain freedom of speech, by saying that law is concerned with man in his Social Relations towards his fellow men and his material environment, in the same degree as Theology is concerned with man in his Spiritual Relations towards his Creator, and Medicine with man in his Vital Relations towards his body. But this assertion will not help us unless we explain what we mean by a *Social Relation.*

To constitute a Social Relation there must be at least two human beings. A human being who chanced to be the sole inhabitant of the earth, would have no social relation towards anything, and in consequence would have no right to anything. This seems to be a paradox, and yet from the jurist's point of view it is a sound proposition, because from that point the position of a man towards a thing has always

two aspects,—the relation between him, and other men whom he excludes from the thing, and the relation between him and the thing which he reserves from other men. It follows, therefore, that whenever we have at least two human beings interested in a thing, a Social Relation arises between those three factors—the one human being, the other human being, and the thing. The resulting Relation, as we shall see, may fall into any one of three different classes—Potential, Moral or Legal—a distinction of moment for our present purpose.

In an uncivilized society it is probable that social relations will be governed mainly by individual prowess without reference to law. The man who has the greatest strength, or skill, or cunning, will exclude other men from those things of which he wishes to take possession. A condition of affairs is produced which is expressed by the saying "Might is right." This saying is incorrect, because might can never be right, or anything else than might. It can never by itself found either a moral right or a legal right to anything; but where both moral and legal right are absent, as in the case of an uncivilized community, might takes the place of right and forms the basis of human social relations, which are in such circumstances called *Potential Relations*, being based solely upon superior power. The counterpart of might is Necessity,—the might upon one side imposing upon the other side the necessity of submission.

It is the primary duty of a civilized community to regulate by means of laws all social relations, so far as the State intends to take cognizance of them. It follows that a State must in the first instance make a selection of certain relations which it intends to recognise. Potential relations are no longer possible, but in place of these we find two classes of relations, which differ from each other according as the State has elected to take cognizance of their subject, or to overlook it. In a civilized community, therefore, it

may happen that a man has to adopt in a particular matter a line of conduct which meets the approbation of his fellow men, but as to which the sovereign power of the State will not interfere either to approve or disapprove. He may pursue this course, supported by the approbation of his neighbours without the aid of the State, but he can continue in it only so long as he is not opposed. This is a *Moral Relation.* The man has a moral right to do a certain thing, and other men are under a moral obligation to let him do it in peace; but, if he meets with opposition, he will have nothing to maintain him in his position except the goodwill or moral support of his fellows.

In such a community, however, a man may pursue a line of conduct in a matter of which the State or sovereign power has chosen to take cognizance, and in which it will support him. This is a *Legal Relation.* It may or may not coincide with a moral relation; but whereas a moral right rests solely upon the goodwill and approval of a man's fellows, a legal right rests upon the underlying support of the sovereign power of the State, which will, if need be, interfere and check opposition. Of these three classes of social relations,—Potential, Moral and Legal,—it is the last alone which calls for regulation by means of laws, and like the social relation, of which it is a species, it consists in its simplest form of one human being and another human being and a thing. Its nature is not changed although one of these factors has characters which are not exactly expressed by the terms "person" and "thing." For example, the substitution of a collective body of individuals for a single individual does not affect the relation, and a State or a corporation may establish a legal relation with another State or corporation, or with an individual. In like manner, the term "thing" is used broadly to cover whatever may be made the subject of a right—whether animals, inanimate objects, or abstract ideas.

In the next three paragraphs we shall analyse the constituent parts of a Legal Relation. The process is curious, if somewhat technical, and is necessary, if we are to see clearly the field of human action and conduct within which laws exert their influence. To begin at the beginning, therefore, a relation of this class gives rise to two positions in which human beings may stand related to each other—a *legal right* or *power* on the one part, and a *legal obligation* or *duty* on the other, both having reference to the particular *thing* or *subject*. This may be called the Triad of the Relation, and expressed in the form of a triangle, having its three points named A, M, and S. In this figure A represents the person who seeks to reserve the exclusive use of, or some benefit from, the Subject S, as against M, the other party to the relation.

If we now analyse the Right, we find that it also has a Triad containing three factors. There is the *Exactor*, who is the individual or body of individuals wishful to exact the right. There is the *Prestator*—the individual or body of individuals obliged to perform or forbear. There is, lastly, the *Subject*, as regards which the one factor exacts and the other performs or forbears. These three elements are united by a *Legal Exaction* or Power. This will be rendered more intelligible if we take an example. Smith has a right to exact from Jones payment of £500. The analysis of this right gives the following triad:—*Exactor*, Smith; *Prestator*, Jones; *Subject*, £500. The Legal Exaction is Payment. Or, to take an example of a wider range—Scott, being the owner of land, has a right to exact from everyone forbearance from trespass on his land. The analysis is—*Exactor*, Scott; *Prestator*, Everyone; *Subject*, Scott's land. The Legal Exaction is Forbearance from trespass. Or, more impersonally, the State has a right to exact from everyone forbearance from stealing the property of others. The analysis is,—*Exactor*, the State; *Prestator*, Everyone; *Subject*, The property of others. The Legal Exaction is Forbearance from stealing.

It is apparent that we are in this analysis regarding the legal relationship exclusively from one point of view,—that of the Exactor. If the State took cognisance of that aspect only, then the law would recognise but one side of human affairs. We must, therefore, invert the relationship, and view it from the standpoint of the Prestator. By doing so we convert the right into the Obligation, which is its counterpart. The Triad of an Obligation, like that of a Right, has three factors. There is the *Debtor*, who is the individual or body of individuals, bound to perform or forbear from some act. There is the *Creditor*, the individual or body of individuals to whom the debtor is under the obligation of performing or forbearing. There is, lastly, the *Subject*, as regards which performance or forbearance is due. These three factors are united by a *Legal Prestation* or Duty. To illustrate this we shall invert the rights we have already cited. Jones is under an obligation to make payment to Smith of £500. The analysis of this obligation gives the following triad—*Debtor*, Jones; *Creditor*, Smith; *Subject*, £500. The Legal Prestation is Payment. Or, to take the other example,—Everyone is under an obligation to Scott to forbear from trespass on his land. The analysis here is,—*Debtor*, Everyone; *Creditor*, Scott; *Subject*, Scott's land. The Legal Prestation is Forbearance from trespass. Or, lastly, inverting the impersonal example,—Everyone is under an obligation to the State to forbear from stealing the property of others. The analysis is—*Debtor*, Everyone; *Creditor*, the State; *Subject*, the property of others. The Legal Prestation is Forbearance from stealing. It will be seen that in the Right and Obligation the legal exaction, the legal prestation, and the subject are the same, while the exactor corresponds to the creditor, and the prestator to the debtor.

Arranging the five ideas which are comprehended by the term "a law," and which have been explained in the pre-

ceding paragraphs, we may formulate a definition, combining those ideas with reasonable accuracy, although it is probably beyond the power of language to frame within the compass of a sentence an absolutely accurate and complete description of them. A law is an imperative rule of general application, recognised by the sovereign power of the State, and governing the conduct of human beings in the exercise of powers and the performance of duties arising out of a social relation established amongst them.

We have now, it may be hoped, attained to the first object which we set before us, namely, a definite understanding as to what we mean by the expression "a law." Having done so, we are in a position to pursue our principal design and seek an answer to the query,—In what manner may a law be theoretically assumed, irrespective of time or place, to take its inception, develop and attain maturity? It is necessary to explain, however, that when we speak of a law taking its inception, we are not thinking of the origin of the *idea of law*. Whether human beings were originally induced to submit their conduct to legal regulation by divine inspiration, natural instinct, or expediency, is a question remote from our present inquiry. It may indeed be doubted whether any positive answer can be given to such a question. Instead of entering upon the discussion of a point so doubtful, we propose to select a law in terms of our definition, and to ask in what way it probably took its beginning and reached its present form. In doing this, it is not necessary to consider the metaphysical question whether a law can or cannot exist prior in time to the social relation which it is intended to regulate. It seems reasonable to conclude that, wherever there is the possibility of a law existing, there is also the possibility that the law exists. For example, no man, since the unhappy experience of Dædalus, has flown in the air. Nevertheless, it would at this moment be quite practicable

for us to frame laws prescribing the rule of the road and other matters connected with flight, and if such laws were enacted they would be true laws, notwithstanding that there is as yet no opportunity of enforcing them. We are bound to assume that at whatever date it was possible to conceive the idea of a particular social relation, whether such social relation actually existed or did not exist at the time, it was then possible for laws regulating that relation to take their inception. Neither need we confuse our purpose by attempting to trace to their origin the laws of our own country. These had for the most part taken their inception long before they were enacted here, being copied or adapted from various sources; Roman, Anglo-Saxon, Celtic, Norman, European, Asiatic or American. It is only amidst the ancient civilizations of the East that we need seek to trace laws to their origin, and even there, although, as we shall afterwards see, the effort has been carried to a great length, we cannot avoid a large measure of mere speculation.

We shall accordingly choose one particular social relation. Any relation would suffice; but, with a view to the illustration we intend to give in a later portion of this essay, we shall select that which arises on the death of an individual, who has left property for distribution, but has given no instructions regarding the manner of distributing it. This relation consists of three factors; the successor (whom we shall call X, as his identity depends upon the law regulating the relation), every other person (E), and the Heritage (H). The triad is thus X—E—H; the first, when ascertained, having a right to exact from E forbearance from interference with H. The human factors in this triad, X and E, whose relation to H must be regulated by law, will embrace four classes,—(1) The sons, grandsons, and descendants of the deceased; (2) His other relatives; (3) Other persons not relatives; and (4) The State. There

is no reason in justice or equity why it should be distributed amongst any one of these classes in particular. It may be argued on *ex facie* valid grounds that the property acquired by a citizen ought to pass at his death either to the State, to some citizen, to a near relative, or to a descendant. The point is peculiarly suitable for regulation by law, and as a matter of fact is so regulated in different ways in different States. In an uncivilized community, where Potential Relations prevail, the matter would be simply disposed of by the most powerful individual appropriating the subject to his own use. In a civilized community such a proceeding is inconceivable, as this social relation is one of the first of which the State would elect to take cognizance. There must, however, in each nation have been an occasion when the relation arose for the first time, and when it did so, the argument of might having ceased to be effectual, some form of arbitrament would be sought for the settlement of the conflicting interests. It seems probable that four methods were open:—(1) The parties might agree amongst themselves; (2) They might settle the dispute according to their inherent sense of justice; (3) They might refer the question to the decision of some man, or body of men, in whose judgment they had confidence; or (4) The matter might be arbitrarily decided by the head of the community, patriarch, chief, priest, or king. The ruling which settled the dispute, in whatever way it was reached, is called an *Adjudication*. We shall suppose that the first adjudication on the point in question was *that the heritage should be given to the eldest son of the deceased*. That adjudication was the inception of the law of primogeniture.

Mors omnibus communis. Death is present always and everywhere, and therefore the social relation arising from its visitation is one of the most frequent in human affairs. Again and again the conflict of interests, of which we have

just spoken, would have to be determined. There is a tendency in the human mind to arrive at the same conclusion from similar premises, and also a strong inclination to repeat what has been previously done. Partly from the operation of those causes, and partly to save trouble, it is likely that one of the earlier adjudications would be repeated. This repeated occurrence constitutes a process termed *Aggregation.* By the aggregation of adjudications deciding that the heritage of the deceased should be delivered to his eldest son, a precedent would be established, having almost the force of a law. This consequence would be more likely, if the decision in the conflict of interests rested with a priesthood or similar cult. The rule would not be compulsory, it might not be applied in every case, it would only govern the particular case to which it was applied, and no punishment would follow upon failure to apply it. Nevertheless, the original adjudication would have made considerable progress in the course of its development into a law. It would possess two of the characters comprehended in our definition,—governing the conduct of human beings in the exercise of powers and the performance of duties arising out of the social relation established among them in consequence of the death of an individual; but on the other hand, it would lack recognition by the sovereign power, generality of application, and absoluteness of command.

These three attributes are added when the embryo law reaches the stage of *Declaration.* This last is true legislation or law-making,—the point at which the law attains maturity. There is no fixed rule which determines either the period in the history of a nation at which declaration of the law takes place, or the power by which declaration is made,—ruler, senate, or judge. In point of time it may be influenced by the date of introduction of written characters, although this is not an invariable necessity, because

codes of law are known to have existed in the form of aphorisms or verse long before they were reduced to writing. Whatever may be the cause which leads to declaration of the laws, or whatever may be the authority which declares them, the effect is to give the adjudications, which have been consolidated by aggregation into precedents, the force of laws,—to publish them, to make them imperative, to give them general application, and to insure to them the support of the sovereign power of the State. It must be observed, however, that all laws are not evolved in this way. There is another but less perfect form of declaration without previous preparation, which arises through the decree of an absolute ruler, the act of a legislative assembly, or the decision of a tribunal of supreme jurisdiction. Of this an example may be found in the law promulgated by the decree of Darius, mentioned in the Book of Daniel, which had all the attributes enumerated in our definition, and was supported by a very severe "sanction," to which the prophet had nearly fallen a victim. The whole process of evolution which we have briefly explained,—Adjudication, Aggregation, and Declaration,—is comprehended in the general term *Nomogenesis*.

The average reader grasps abstract ideas more easily, when he is furnished with a concrete example. While fully recognising this truth in the general case, we must guard its application to our present essay by remarking that the long period occupied in the process of nomogenesis renders it a hard matter to find a law whose history can be traced throughout the term of evolution. There is probably no perfect illustration of the process. Nevertheless, an examination of the writings of Sir Henry Maine and other jurists, who have studied the legal systems of the East, discloses facts capable of being utilised to furnish an illustration, which is at least suggestive. That illustration is the evolution of the Hindu law of *Primogeniture*. In selecting

and using these facts we of course accept the entire responsibility for our conclusions, and for the manner in which we have commented upon them.

Towards the close of the eighteenth century Sir William Jones was appointed a judge of the Supreme Court of Judicature in Bengal. It was part of the duty of that Court to apply the native laws in questions of inheritance and contract, and, as the British judges could not be expected to know these laws, native scholars, called Pundits, were attached to the Courts to advise respecting the rules of which they claimed to be the depositaries. A suspicion arose (whether well or ill-founded we know not) that the Pundits manufactured the law to suit the occasion. Sir William grappled this suspicion firmly, and undertook the preparation of a Digest of Hindu and Mohammedan law, compiled from the original sources. Thus began that systematic study of the native laws in India, which has led to so many valuable discoveries in jural science. We need not expatiate on the results of the application of the historical method of inquiry to this deeply interesting subject. It is enough for our present object to say that the practice of *ancestor-worship* may be traced backwards from the present time through the ancient writings till its origin is lost in the mists of antiquity. That practice contained the germ of the *law of primogeniture*. It rests upon an assumption of the unity and continuity of the family in this world and in the world of spirits, and supposes that the two divisions, although separated by the river of death, are mutually dependent. The ancestors in the world of spirits protect their descendants in the world of flesh, receiving in return those ceremonial observances which are essential to their own welfare. The deceased members suffer, if the living members neglect the daily sacrifices; the living suffer if the deceased cease to protect them. Seven links compose the family chain, corresponding to the man and the six

generations above and below himself which he may see at one time of his life or another, namely, great-grandfather, grandfather, father, THE MAN, son, grandson, and great-grandson. The Man, the present head of the family, pays religious observance to the three who have last gone over to the majority—his father, grandfather, and great-grandfather, —and so strong is the native feeling on this point, that a man is held to be for ever accursed who neglects to present the customary oblations.

Some readers may ask,—what has all this to do with primogeniture? At first sight the relation is certainly not apparent, but more attentive consideration discloses an intimate connection between the practice of ancestor-worship and the distribution of the family estate. The first effect of the reverence paid to ancestors must have been to give a peculiar signification to paternity and sonship. Father and son were in this respect but the present and prospective heads of the family, and the persons by whom now and in the future the daily sacrifices are and will be made. Their position was one of trust, because the well-being of the other members was dependent upon the fidelity with which the officiating head discharged his duty. Looking forward, it was apparent that the son was the next link in the family chain, and the person on whom alone devolved the duty of performing the funeral obsequies and maintaining the needful offerings. As the inferior place assigned to women in the East barred them from performance of the sacrificial duties, sons received especial esteem; and as only one hand was required to make the offerings, the eldest son was preferred, because at his birth the next link in the family chain was forged. The natural and obvious result of ancestor-worship, therefore, was to give the preference to *males* among the descendants of the deceased, and to the *eldest son* amongst the male issue. The funeral obsequies were costly, and the daily offerings could not be made out of

an empty purse, yet if these were neglected the whole family must suffer. It followed from these considerations that the eldest son was not only preferred as the new head of the family, but also that the estate of the deceased was handed over to him in trust for the due observance of the ceremonies. It is curious that an analogous idea seems to have suggested itself to the Church of Rome, in so far as the Bishops used to claim the moveable property of persons dying intestate, as a fund out of which to defray the cost of masses to secure the eternal welfare of their souls.

A perusal of the works of the jurists who have studied the ancient Hindu writings, leads us to conclude that the law of primogeniture was established by some such process as we have sketched. Of course, there is a great deal of supposition in the matter, and possibly the conclusion is quite erroneous, but so far as we can see, all the presumptions are in favour of the theory. It now remains to trace out the probable process of development by which the principle of primogeniture came to have the *force of a law*, governing the succession of all Hindus. We may assume that at some remote period the conviction had forced itself upon the surviving members of a family that their welfare was closely linked with that of their departed head. The deceased may have been a man of outstanding ability, whose place they could not fill, and they may have sought to minimise their loss, to comfort themselves and to alarm their enemies, by devising the fiction that he still watched over them. To impress this fiction with the utmost force, the funeral obsequies would be conducted with unwonted solemnity, and commemorative services would be instituted. These innovations involved the expenditure of means, either money or goods, and it would have to be decided who was to be the new head of the family, subject to the understanding that he was to receive the estate of the deceased in order that he might duly perform the sacred ceremonial. A Social

Relation thus arose. In that relation the Right might be stated thus:—The Exactor *(the new head)* had right to exact from the Prestators *(everyone else)* forbearance from interference with the Subject *(the estate of the deceased).* The choice of the new Head, the manner in which his right should be exercised, the nature and extent of the counterpart obligations falling upon other persons, the form of the funeral obsequies, and the character of the commemorative observances, would necessitate a number of rulings or Adjudications. These adjudications would regulate the conduct of the parties concerned in that particular relation, but would not affect the conduct of those who were not so concerned. Similar adjudications in the same family or others would cause an Aggregation, by which there would be constituted a precedent or rule, general in its application, but lacking the support of the sovereign power. The importance of the ceremonial rites had by this time no doubt given rise to a class of men ministering in sacred things, such as we know in later times by the name of Brahmans, and these would naturally assume the right of expounding and applying the precedents. Finally, Declaration of the law took place on the publication of the ancient codes. From that time the rules were wider in their reach, and gradually came to govern the whole question of succession and to secure the inheritance to the eldest son, or (if there were no son) to an adopted son of the deceased, subject to due performance of those ceremonial duties, which were deemed requisite for the welfare of the ancestors in the world of spirits, and for the prosperity of the descendants in their sublunary abode.

With this illustration we shall close our essay. Carrying the mind back over what we have written, it seems possible to glean a practical lesson of some importance, namely, that the true function of law-making or law-giving is to *declare the law, not to invent it.* Were this truth better

understood we should not have to complain of so much *hasty and ill-considered legislation. It is difficult* to estimate what this would mean to the public, for although it is common knowledge that vast sums of money are annually spent in seeking by litigation to decipher the meaning of crude and ill-drawn statutes, no one can gauge the loss which results from doubts and misunderstandings induced by confused and unreasonable statutory provisions. It is the interest, therefore, of every citizen to learn something of the philosophy of law, and he may be stimulated to greater exertion by the reflection, that he is following the advice of David Hume in the selection of a field of philosophic inquiry. "Indulge your passion for science," says Hume, "but let your science be human and such as may have direct reference to action and society. Be a philosopher, but amidst all your philosophy *be still a man.*" The jurist, studying human conduct in its social relations, is in his philosophy, above all other philosophers, a Man.

HENRY HILTON BROWN.

III.—THE WORKING OF THE REGISTRATION OF TITLE ACT IN IRELAND.

THE dissatisfaction experienced and expressed in England with the working of the Land Transfer Act of 1897 induces me to give a short description of the operations of a similar measure in Ireland. At present very extensive transactions (some 70,000 cases) under the Land Purchase Acts have been satisfactorily carried out under the provisions of the Local Registration of Title Act 1891, as all such arrangements must be compulsorily registered under the latter Act. The Act is not perfect—what work of British legislation is?—but it has so far been found to work out

relatively with economy and efficiency. The rates of registration cannot be considered objectionable on the grounds of want of moderation, and they might conceivably be made more liberal, but they compare favourably in this and in other respects with its analogue the English Transfer Act of 1897. By the Irish Act all transactions under the various Land Purchase Acts or any Acts under which public money is lent on land for the purpose of its purchase; must be compulsorily registered, and the local and central registration authorities have already registered some 70,000 purchase transactions (see sects. 23, sub-sect. 1 and sect. 32 of the Land Act of 1896). The registration is now made by the Land Commission, which advances the money and stands as mediary between the occupier and owner of the land being transferred.

In order to remedy defects in the existing law, the Local Registration of Title (Ireland) Bill was introduced in 1889 by Mr. Justice Madden (then Attorney-General) and passed in the Session of 1891. The intentions of the framers of the Act as stated in the Memorandum to the Bill were as follows—(1) "To provide a simple, inexpensive, and easily accessible land registry for all occupiers of land in Ireland, but in particular for those purchasing their holdings under the Purchase of Land (Ireland) Acts where compulsorily brought within the provisions of Registry of Deeds Acts, and (2) to substitute for the Record of Title an improved system of registration, which might be made use of by any landowner who preferred the system of Registration of Title to that of the Registration of Assurance carried out in the Registry of Deeds."

The main provisions of the Act may be summarised under four heads:—

(1) The registration of the ownership of freehold land (that is, land the full ownership of which is an estate in fee simple) is compulsory where such land has been at any time

sold and conveyed to or vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts, and is subject to any charge in respect of an annuity or rent-charge for the repayment of an advance made under any of the said provisions on account of the purchase-money; first registration under the Act being voluntary in all other cases.

(2) That a person shall not, under any conveyance executed on or after the commencement of the Act, acquire any estate in land the registration of which is compulsory until the ownership of the land under such conveyance has been registered, but on being so registered his title will relate back to the date of the execution of the conveyance, and any dealings with the land before the registration will, upon registration, have effect accordingly.

(3) That where land, the registration of which is compulsory, has been registered under the provisions of the Act, and is vested in any person without right of survivorship to any other person, the legal interest in the land, notwithstanding any testamentary disposition the registered owner may have made, will upon his death devolve on the personal representatives as if it were a chattel real; but the personal representatives are to hold the land in trust for the beneficiaries.

(4) That, on the death of a person intestate as to any such land, the beneficial interest therein will devolve upon and become divisible among the next-of-kin in the same manner as personal estate.

The Act attempts to remedy admitted defects and remove absurd anomalies as regards the registration of Irish land, and so far as it goes it successfully does so. If it has its deficiencies—and what Act has not?—and if it does not go far enough, in that failing it possibly errs on the safe side. It is far easier to extend the range of operation of a law found in practice to be useful and beneficial, than it would be to restrict its provisions and confine its working. So

far, great credit is due to its distinguished author, Mr. Justice Madden—an authority at the Bar on conveyancing. He introduced the Bill and carried it through, not in obedience to any public clamour or popular demand, for, strange to say, no public body seemed to call urgently for the reform. From his perfect knowledge of the defects of the existing law, he knew and felt that, as he said, "any agrarian legislation would be imperfect, if not useless, which was not followed up by a complementary measure, giving facilities for the easy, economical, and expeditious registration and transfer of land."

With the abstract merits of this question of Registration of Title, it would be superfluous to occupy much time in a detailed review of the vast volume of testimony, Parliamentary, public, professional and private, which has been accumulated upon this subject, all going, without qualification or reserve, to prove the urgent necessity for a change in the old feudal law which had so seriously weighted down and encumbered any tendency towards what has been aptly called "Free Trade in land." It is wonderful, regarded in the abstract, how such an admitted abuse of privilege could by any common-sense people be permitted to tie up land and go so far to ruin, as it was fast tending to, the great industry of the country. Agriculture, even in rich manufacturing England, has, as the country is now in its depopulated villages finding to its cost, been too long neglected; but what can be said of the neglect with which it has been legislatively treated in agricultural Ireland? A good deal has been done to remedy this state of things, but a great deal yet remains to be done, for the longer the delay of reform the greater must be the ultimate measure of the change. The efforts made to free land from the old cumbrous system of conveyancing, and to provide a legal machinery by which a vendor can sell and a purchaser obtain a simple, clear, and indefeasible title, or

by which such title can be proved or found for the purposes of personal credit in a loan or mortgage transaction, go back a long way. Before the Conquest the entry on the Shire Book, and the proceedings in the public Shiremote, were a means by which *coram publico* a transfer of land could be clearly and readily effected; but with the Normans came mystification and muddling, and the invention of Uses, and other devices of the ecclesiastical lawyers of these days, tied up the lands and indirectly thereby robbed the people of their inheritance. The Local Registry in Ireland, established under this Act in every Assize town in Ireland, is but a reversion to the good old Saxon system. Even at the Restoration in England it was admitted in the Lords' Journals (Vol. XII, p. 273), that "one cause of the decay of the rent and value of lands was uncertainty of the titles." Still the abuse largely exists and works its evil. Up to 1857 even, over twenty bills were introduced in Parliament on the subject, and Select Committees, innumerable, reported in favour of a Registration Act. Three great Chancellors (Hatherley, Westbury and Cairns) lent the subject the aid of their ripened intelligence, great experience and power, yet, even with these forces in its favour, the reform has yet to be carried out.

The Irish Act is undoubtedly a great step in the desirable direction, and it lays the groundwork for a plan of registration admirable in conception and in the simplicity of its machinery. It establishes two great principles which alone serve to make it a memorable measure of justice and reform. By its 85th section it boldly destroys that gangrene which eats into the social life of the country, that curse of feudalism known as primogeniture. This, like the tying up of land in an inextricable and endless labyrinth of conveyancing cobwebs, has hung since the Conquest in England, and, since the introduction of the English Law in Ireland, upon both countries, and it exists to-day in these alone among

all other countries in Europe or America. Henceforth, however, land purchased by any Irish heir and under either the Church Act of 1869, the Bright clauses of the Land Act of 1870, or the Purchase clauses of the Acts of 1881 or 1896, or the special measures identified with the name of Lord Ashbourne, and known familiarly as the Ashbourne Acts, or the new Purchase Act, will be freed from the law of primogeniture which otherwise would effect its devolution on the death and intestacy of the purchaser. This will be no longer the case—the registered estate or farm will now go to the representative of the deceased in the same way and order as personal property is inherited. The peasant proprietor's eldest son will no longer, as in the case of the former landlords, be considered by the law a privileged being by reason of the accident of his birth, and entitled to sole possession to the exclusion of the other members of the family. There will no more, so far as these State purchased lands are concerned, be legal preference recognised in favour of the first-born as against the rest of the family. The natural law will operate, and in Ireland for the future the same law which obtains in every other country of the world but England will prevail. In continental Europe and in America the children of a deceased owner inherit, as a general rule, in equal degree. It is unnecessary to go into the various degrees of difference in the different countries, but it may be taken as an universal fact that everywhere equal partibility exists on intestacy. In France, and countries subject to the Code Napoleon, even the power of disposition by will is restricted, and an owner can only dispose of his land under certain restrictions—a testator with only one child being allowed to dispose of half, one with two children of one-third only, and a testator with three children of one-quarter. No reasonable reformer seems anxious to limit in any degree the rights of the parent, but every reasonable reformer opposes a

system which creates a law of inheritance on an intestacy opposed to parental instincts and the very promptings of nature. The law and custom of primogeniture is a purely feudal institution, devised to keep intact the estates of a chief so that every acre on his death should descend in unbroken completeness to his heir, that he might maintain the pomp and circumstance of his rank even at the expense of beggaring his brothers and sisters. It is not to be found in Roman law, but the ingenious Blackstone imagined he saw something like the practice in the Jewish principle of birth-right. Of course, it may be possible that if the contrary practice of partibility is to prevail in Ireland it may lead to the evil of subdivision, but that is not an immediate danger, as the State-aided purchasers are debarred from pursuing that pernicious practice upon smaller holdings than twenty statute acres. When it is likely to arise it can easily be dealt with by such an admirable law as is found existing in America, under which, when an estate is inconsiderable and it cannot be divided without great injury, that is to say, when partition would materially lessen its value, the Probate Court, which has jurisdiction in these matters, may decree the whole or any part of the land to one of the heirs who would thereupon be called upon to pay such a sum of money to the other children as the Court thought fair and reasonable. So far, however, we have to welcome, even on the present limited area of the State-aided purchased land, the abolition of the baneful law of primogeniture. This reform in the future law of inheritance and descent is one for which we are indebted to the Act under our notice.

A more general reform is the machinery the Act establishes for the future registration of title. In all the counties of Ireland local registries under the control of the respective Clerks of the Peace or Crown are established wherein all the land of the county must be registered.

Duplicate records are kept in Dublin at the Central Office. The Registrar there has the management practically of the working of the district system, and with his staff of experts is always able to prevent any mistakes being made locally. An admirable improvement on the old system is that under which the Ordnance Survey maps will be alone used for the purposes of the registry, and by that means any confusion of names will be obviated. The designation of the particular parcel on the Ordnance Survey as regards its name, quantity, and location will furnish the particulars alone which will be found on the registry as regards such registered land. The principle upon which the system is worked is that it is the land—the fixed determinate thing—that is the unit of registration and not the owner. A certificate of registration is given after due inquiry and notice, and that clear, intelligible, handy form will constitute the title of the recorded owner and save him and others the cost of those elaborate conveyances and intricate searches which so complicate land transactions as to make land as a commercial and common source of credit practically useless. The evils of first mortgages and second mortgages, under which it became a very risky experiment to lend money on the latter no matter what the possible margin of value, will be done away with, and the land can be easily mortgaged for what it is really worth. Besides, the certificate will be an indefeasible title subject only to the registered charges, and it will be possible for a borrower and a lender unaided to become acquainted in a few minutes with everything concerning the particular parcel of land which it is proposed to pledge. I look upon that alone as a valuable instrument of credit for the Irish farmer. For the first time in the history of this country the peasant owning land will have such a clear, plain, simple title to it, that "he who runs may read and understand it." There will be no mystery about it—no wasting of time in tedious investigations which in the

end often make matters more hopelessly involved. On the contrary, the title will be a clear and a clean one, and the measure of its clearness will be the measure of its credit value. Land banks may yet be established, as on the Continent, for monetary transactions in land, or, perhaps, the present institutions will change the existing obnoxious bill system and adopt one more in keeping with the nature of the improved instruments of credit.

Individual credit must with Irish banks become more common, when the present practice of "backing" bills, which exhausts two men's credit on one transaction, will disappear. This personal credit system at present largely prevails in Scotland. The advantages generally of the Irish system are indisputable. Wherever it has been worked, and more or less it almost universally exists, it has tended to the benefit of the farming classes. In Australia, where under the Torrens system land registration works so perfectly, its effects are something wonderful. For one instance alone it has been found to have the beneficial result that:—"Real estate can be bought, sold or encumbered by a very simple and inexpensive process. The Government guarantees are indefeasible title, and all transactions relating to land are so expeditiously and cheaply effected that in the year ended 30th June, 1899, the cost of 17,422 registration sales and mortgages covering property to the value of £7,585,291 was only twenty-two shillings and ninepence (22s. 9d.). Let anyone who knows anything of conveyancers' bills in the mother country ponder well upon the full force and meaning of these highly significant statistics" (Mr. J. Franklyn's *A Glance at Australia*, quoted by Sir R. Torrens). Further, it has been said what we hope may yet be true of this country:—"The working men of New South Wales are almost all becoming land proprietors."

Sir R. Torrens thus epitomised the proved advantage of the system:—

"Land can be dealt with as easily as a share in a ship or a joint stock company, and with the same security as regards title . . . . Under the Land Transfer Act it is not necessary to examine the deeds in the abstract of title: these no longer exist. They have been delivered up to the Registrar and when a certificate of title is granted they are cancelled. An investor therefore does not run the risk of a mistake or blunder of his solicitor. Every transaction has its finality and complete security. In fine the benefits which have attended this measure wherever it has been adopted in its integrity, as proved on the foregoing evidence, may be thus summed up:—

"Firstly: It has substituted security for insecurity.

"Secondly: It has reduced the cost of conveyancing from pounds to shillings, and the time occupied from months to days.

"Thirdly: It has substituted clearness and brevity for obscurity and verbiage.

"Fourthly: It has so simplified ordinary dealings that any person who has mastered the three R.'s can transact his own conveyancing.

"Fifthly: It affords protection against the largest class of frauds, such as those practised by the notorious Down and recently by T. F. Cooper.

"Sixthly: It has restored to their natural value many estates held under good holding titles but depreciated in consequence of some blot or technical defect, and has barred the recurrence of any such defect.

"Seventhly: It has largely diminished the number of Chancery suits, by removing the conditions which afford ground for them."

A system that to a large degree is worked on the foregoing lines, and which can therefore be expected to have the same excellent results, is one certainly to be welcomed, as is any improvement which tends to better the position of the Irish

farmer and brighten the prospects of Irish farming. The Irish Act is, as I have shown, compulsory only as regards the State-aided purchasers, but as these arrangements are likely to comprehend in a short time the bulk of transactions in land, its deficiency in that respect is not so likely to be felt; but, undoubtedly, to be perfect, the Act should be universally obligatory. That great economist whose death but a few years ago Europe mourned—Mr. Laveleye—and whom we in Ireland in a special degree should regret (for he was always a staunch friend of this country) describes the working of the Registration system in Belgium, and shows its advantages and utilities. There, as of course elsewhere, it tends to make land negotiable. There, as elsewhere, "land gets into those hands by which it can be turned to the best account; the title is incontestable and secure, as it should be, and there are no legal obstacles to the subdivision of land when the natural economy tends to it." And reviewing the benefits of the scheme, that illustrious economist enunciates these great truths :—"The larger the number of landowners is in a country the more free and independent citizens there are interested in the maintenance of public order. Property is the essential complement of liberty. Without property man is not truly free. Whatever rights the political constitution may confer upon him, so long as he is a tenant he remains a dependant being. A free man politically, he is socially a bondsman."

It has often been suggested that the advantages of a registry for title are doubtful and problematical, and those who use this argument against the system base their case upon the grounds principally that, if a title is a good one, registration does not better it, and therefore will not be sought; and, if a bad one, it will not be found likely to be presented for investigation. These reasons are very specious, and overlook the general advantages to the community of a system which ensures to the public in all

transactions concerning land that there shall be about them a clearness and simplicity, coupled with publicity, that will keep them above suspicion. If there is anything in the argument it is rather in favour of making so necessary a measure compulsory. Besides, there is another sort of title common enough in England, but, through the operation of the Irish Landed Estates Court Act, not so much so in Ireland, a title known variously as a blistered title or a good holding title. For such the process of registration is eminently suited, as the indefeasible title so afforded will cure all defects of antecedent date. It will, with a land certificate to deal with, be comparatively so easy and correspondingly safe to deal with land so held. The root of title is there on the face of the document, and every transaction which affects it prejudicially must, to be of any validity, find its place as against the accounts of the land in question in the agricultural ledger of the county where it is situated—the Local Registry. A visit to that convenient centre disposes in as many minutes as it formerly took months, and at the cost of as many pence as it formerly took pounds, of all doubts that may arise as to the incumbrances against the title under investigation. Who will venture in these days of reform to deny the utility of such a change or dispute its evident advantage to the public? The wonder really is how such an abuse so long continued and was borne with so patiently. The congested condition of the land market in these countries; the curious fact that thousands of acres are for sale, and thousands of pounds are available for their purchase, and not a rood changes hands while the money goes into every form of South American adventure; all these frequent facts attest the urgency of a change, and that not a moment too soon for the salvation of the great industry of the country must this old feudal system of consolidating, tying up, and preventing by every device the partibility of land be reformed, and give

place to a plan which is more in consonance with the spirit of the age, and the needs of the time by establishing, as far as possible, Free Trade in land.

The Irish Registration of Title Act has been incorporated with the Small Dwellings Acquisition Act of 1900, and under its provisions all houses so acquired must now be compulsorily registered. So far, transactions under the latter enactment have not been very numerous or important, but should they increase the machinery for the easy registration of the acquired dwellings exists.

RICHARD J. KELLY.

IV.—SPECIFIC PERFORMANCE.

(*Continued from Vol. 28, page 410.*)

I cannot do more, I am afraid, than run very briefly through the rest of the classes of contracts with regard to which the remedy of specific performance is not obtainable.

The Court does not, as a rule, grant that remedy—

(Secondly) Where the contract is one for personal services—for the reason indicated in the proverb, that "you can take a horse to the water, but you can't make him drink": or—

(Thirdly) Where the performance of the contract would involve a long series of acts or operations—such as house-building, mine-working, or railway construction—for, speaking generally, the Court could not conveniently undertake the superintendence, or effectually enforce the execution, of such works: or, again—

(Fourthly) Where the Court cannot specifically enforce the whole of the contract: or—

(Fifthly) Where the effect of enforcing performance would be to compel the defendant to do something which he is not lawfully competent to do, or which would involve a breach of trust: or—

(Sixthly) Where the agreement sued on is a merely voluntary agreement—without consideration: or—

(Seventhly) Where the plaintiff does not come to the Court with perfectly clean hands: or—

(Lastly) Where the contract is illegal, or the enforcement of specific performance would be highly unreasonable or impracticable.

From these broad general rules there are, I need hardly say, exceptions. For instance, although contracts to build or to construct works are not, generally, specifically enforced, the Court is disposed—I think I may say increasingly disposed—so to enforce such contracts, where (first) the work to be done is defined, and (secondly) the plaintiff's interest in having it done is substantial, and such as could not be adequately compensated for by money damages, and where (thirdly) the defendants have, by means of the contract, got from the plaintiff actual possession of the land on which the work is contracted to be done.

Thus railway companies have, under such circumstances as I have just outlined, repeatedly been ordered specifically to perform contracts to make and maintain accommodation works for the convenience of the plaintiff's land; and in a quite recent case[1] a purchaser of land from an urban sanitary authority was similarly ordered to perform a contract to erect houses on the purchased land, in accordance with plans which had been submitted to and approved by the plaintiffs.

And again, although generally the Court will not interfere to compel specific performance of part of a contract, where it cannot so enforce it as a whole, still, where it is apparent

[1] *Wolverhampton Corporation* v. *Emmons* ([1901] 1 K. B. 515).

on the face of a contract that the parties intended that it should be carried into effect piecemeal, then a default in the performance of one part of the contract is no defence to an action for the specific performance of another part.[1]

I have pointed out to you some of the cases in which, supposing you to be a plaintiff, you may, and some in which—the rules (perhaps you may be inclined to say the self-imposed fetters) of Courts of Equity being what they are—you cannot, in this country, get a judgment for specific performance.

Let me now take the liberty of imagining you to be in the position—which I hope you will never actually occupy, though, indeed, it may be thrust upon any of us any day, without any fault whatever on our part—of defendant in an action for specific performance; and let us consider for a few moments what grounds of defence you may be able to avail yourself of. Well, I may tell you at once that the number of the well-recognised possible grounds of defence is so great as to be almost bewildering. In the current edition of Sir Edward Fry's treatise on *Specific Performance*, they form the subjects of five and twenty chapters, and occupy nearly three hundred and fifty pages. But, at all events for our present purpose, they may all be condensed into something under half-a-dozen.

For, in substance, your defence—if you have any—will fall under one or other of the five heads following:

You may be in a position to plead

(i) There is not any [binding] contract at all; or

(ii) At all events, the plaintiff cannot prove that there is a contract; or

(iii) Granted there was a contract, it has come to an end; or

[1] *Odessa Tramways Co.* v. *Mendel* (8 Ch. D., at p. 244).

(iv) Granted there is a contract, it is one of a kind which the Court does not enforce specifically; or, lastly,

(v) Granted there is a contract, and also that it is one of a specifically enforceable kind, still it is one which it would not be fair, under the particular circumstances of the case, to enforce against the defendant.

Let me say just a very few words about each of these Heads of Defence in turn.

First, then,—

"There is not any contract at all."

Under this head you may be able to defend yourself successfully by showing that (a) the terms of the contract alleged by your opponent are too ambiguous, indefinite, uncertain, or vague, to be accepted as a binding contract and enforced by the Court; or that (b) the alleged contract is *incomplete*, that is to say, defective in respect of some essential and material term, such, for instance, as the price or other consideration to be paid or given; or that (c), what your opponent calls a contract was really nothing more than a negotiation in which there never was reached that "*consensus ad idem*" which is necessary to constitute a complete, "concluded", contract; or that (d), the alleged contract was conditional upon something being done which has not been done.

Secondly—

"At all events the plaintiff cannot prove that there is a contract."

This does not, perhaps, sound a very brave kind of defence; but the law allows it; it is quite in accordance with one of the great rules of the game of litigation, namely, that

it is the plaintiff's business to prove his case; and, as a matter of fact, most defendants do plead it if they have got the chance.

It usually means that the defendant did in fact agree to do what the other side alleges, but has since changed his mind and now does not intend to perform, if he can help it; and further (here comes in the point and strength of the plea), that the agreement happens to have been one which the Statute of Frauds makes (not void, indeed, but) unenforceable, unless its terms are evidenced in writing, signed by or on behalf of the defendant, and that, in the particular case, there either is no such writing at all, or it does not contain all the essential terms—such, for instance, as the names of the contracting parties, or an adequate description of the subject-matter of the agreement.

Thirdly—

"Granted there was a contract, it has come to an end."

In other words, this plea means that the contract has been rescinded. Such rescission may have been brought about in one or other of a considerable variety of ways; by a simple agreement between the contracting parties, for instance; or by what is called a *Novation*, where some third person has taken the place of one of the original contractors; or by the exercise of an express right to rescind, which was reserved by the contract to one or both of the parties; or by the defendant having rescinded on some ground which the Court recognises as entitling a party to a contract to annul it, such as fraud, or absolute refusal to perform, or unreasonable delay, on the part of the other party.

But, of course, where a defendant admits there was a contract, but says it no longer exists, the *onus* is upon him to prove the rescission.

About my fourth head,

"*Granting there is a contract, it is one of a kind which the Court does not enforce specifically,*"

I do not propose to say anything more, as I have already indicated to you the classes of contracts of which you cannot, in England, obtain specific performance.

So we come to the last of my general Heads of Defence, namely,—

"(v) *Granted there is a contract, and also that it is one of a specifically enforceable kind, still it is one which it would not be fair, under the particular circumstances of the case, to enforce against the defendant.*"

This last is, I need hardly say, a very comprehensive head. I mean it to cover cases where the ground of defence is Fraud, or Misrepresentation (fraudulent or innocent), or Mistake (of law or of fact, common or one-sided), or Hardship, or Want of Mutuality (that is to say, that, at the time when the contract was made, it was not mutual, in that it could not have been enforced against the plaintiff—as, for instance, if the plaintiff was an infant), or Want of Title (*i. e.*, that the plaintiff, being a vendor, cannot make such a title to the property the subject of the contract as the defendant purchaser is entitled to require), or Delay on the part of the plaintiff, where time is essential, or hardship would result to the defendant from treating lapse of time as immaterial.

The mention of fraud, *i. e.*, fraud either in obtaining a contract, or in the course of its performance, as one of the grounds of defence to an action for specific performance, tempts me to pause for a moment to quote to you a striking passage from Lord Macnaghten's speech in a recent House of Lords case,[1] which, if you do not already know it, you will, I am sure, be glad to know, or, if you have read it,

[1] *Reddaway* v. *Barham* ([1896], A. C. 221).

you will be equally glad to hear again. "Fraud," he said, "is infinite in variety. Sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself, if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court."

To resume:—in connection with the topic of Defences which we have been considering, and particularly with the very common defence that the provisions of the Statute of Frauds have not been complied with, I should like to say a few words to you in respectful protest against the use of a certain time-honoured expression which I myself believe to be founded upon an historically erroneous notion: I refer to the familiar phrase that a contract is "taken out of" the Statute of Frauds in cases of—(i) fraud; (ii) part-performance; (iii) admission of the contract by the defendant; and (iv) sale by the Court.

What I want to submit to you is that, in these cases, the contract is not "taken out of" the Statute, for the simple reason that it was never within it.

For that Statute was passed, as you know, in the twenty-ninth year of the reign of Charles the Second, and when it said, in its well-known 4th Section, "No *action* shall be brought whereby to charge any person . . . . upon any contract of sale of land," etc. (in the absence of an agreement or memorandum in writing, signed by the party to be charged, and so on), the word "action" meant the only kind of action then known to English lawyers, *i. e.*, an action at Common law. Suits in Equity were not touched by—were not within—the language of the 4th Section. Now it is as true as we can reasonably expect a maxim to be, to say that "Equity follows the Law." But it needs adding, that the following sometimes takes place at a judicious and discriminating distance. And, in this particular instance of

the Statute of Frauds, I believe—though I cannot give you chapter and verse for my belief—and I venture to suggest to you, as a working hypothesis which accounts for the facts, that what really happened was this: that the Courts of Equity, loyally desiring to obey the spirit of the enactment, and aware that they were, fortunately, not bound by the letter of it, held themselves bound by, and gave effect to, the provisions of Section 4, except in certain strictly-limited classes of cases—I have already mentioned them—in which they saw either that the effect of following the Statute would be to make it (not a protection against, but) an instrument of fraud or injustice; or, that the case was otherwise outside the mischief which the Statute was clearly intended to prevent.

Accordingly, when, for instance, a clear and complete verbal contract for the sale of land has been partly performed by the purchaser being put into possession of it, the Chancery Division will deal with the case, and order the vendor to perform his part specifically, just as if the Statute of Frauds were not in existence. It will regard the case as one to which the Statute simply does not apply, and in that sense, but in that sense only, as an "exception" from the Statute.

There is, however, a word of warning which may, perhaps, usefully be addressed to you as practitioners, in connection with the equitable doctrine concerning Part-performance; and it is this:—

It is of no use to ask the Court to enforce specifically a verbal contract relating to land on the ground that it has been partly performed, unless your parol evidence will prove, plainly and distinctly, a contract complete in all its terms. Part-performance is not a panacea, and does not avail to cure any defect in a contract other than the formal defect of want of the written evidence required by the Statute of Frauds.

I pass, now, to a curious and noteworthy creation of English Courts of Equity, which has this feature in common with the equitable doctrine of Part-performance, that nearly all the reported cases in which it appears have been cases of contracts relating to land, or some interest in land. I refer to the equitable principle of Compensation in connection with specific performance. In its original and simplest form, this principle is a good-looking and attractive one. Take, for instance, the following illustration of it:— A., a landowner, agreed to sell to B. 1,000 acres of agricultural land for £20,000, *i. e.*, £20 an acre; but in fact (though he did not know it at the time of the contract) A. owned 999 acres only. At Common law A. could not have maintained an action on the contract, because he could not strictly perform his part of it—could not convey 1,000 acres. But Courts of Equity said: "If A. conveys the 999 acres, and allows B. £20 off the contract price, by way of compensation to him for the acre short, that will, in substance, be a specific performance of the contract, and will work out justly and fairly for both parties; so we will, at the suit either of A. or of B., enforce the contract as nearly specifically as possible, with compensation to B., in the shape of an abatement from the purchase-money, for the small quantity of land which A. cannot convey to him."

Now, if the application of the principle had been confined to cases of the character of the illustration which I have just given you, I, for one, should not have cared to say a word in criticism of it. But, unfortunately, when a man sets to work to act upon a principle, it is only too apt to happen that either the principle runs away with the man, or he rides it to death.

And, even so, it happened that by a series of decisions, each going just a little way beyond the last, this principle of compensation—which a famous Lord Chancellor once enthusiastically described[1] as "the perfection of our

[1] In *Halsey* v. *Grant* (13 Ves., at p. 77).

jurisdiction"—became extended, in cases where a purchaser was the party seeking to enforce a contract, to this; that the purchaser should be given by the (Chancery) Court's decree, (1st) a conveyance from the vendor of all that he could convey, *even though that were substantially different* from the expressed subject-matter of the contract, and, *in addition*, (2ndly) compensation (so-called)—commonly by way of abatement from the agreed purchase-money—for the difference.

The following illustrations, taken from two modern cases, will show the lengths to which this process of extension has gone.

In one case[1] vendors had contracted to sell the entirety of some freehold property. It was afterwards discovered that they were entitled only to an undivided moiety of the property. The purchaser obtained a decree for specific performance by the vendors to the extent of their moiety, with an abatement from the purchase-money of *one-half its amount!*

In another case,[2] A. contracted to sell the fee simple of some land to B. In fact A. had only a life estate, the remainder in fee belonging to his wife. It was held that B. was entitled to have A.'s interest conveyed to him, with (so-called) compensation, the proper amount of which "the Court," said the Judge, "must endeavour to find out in the best way it can" (!), in respect of the wife's interest, which A. could not convey or bind without her consent.

In each of these two cases—and they are only samples of many to be found in the Reports—it is obvious that the effect of the Court's decision was not, in any proper sense of the words, to enforce specific performance of *the* contract which the parties had themselves made, but rather to alter the bargain—to frame a substantially different contract

[1] *Hooper* v. *Smart* (L. R., 18 Eq. 683).
[2] *Barnes* v. *Wood* (L. R., 8 Eq. 424, 429).

(which *non constat* the parties would ever have entered into), and then to enforce specifically that different contract.

The law of Scotland, though familiar, as I have mentioned, with specific performance, knows nothing of the illogical English remedy of "specific performance with compensation."[1] For better or worse, however, the principle (as it is called) of compensation has become firmly established here in England; but it is, I trust, permissible to hope that in the future its application may be limited, in accordance with a view of it which has quite recently been expressed by a learned Judge of the Chancery Division. "In my opinion," said his Lordship,[2] "the Court should confine this relief [*i. e.*, specific performance with compensation] to cases where the actual subject-matter is substantially the same as that stated in the contract, and should not extend it to cases where the subject-matter is substantially different."

It is a common inaccuracy to speak of the "fusion" of Law and Equity under and by virtue of the Judicature Acts. That, in truth, both jurisdictions—that of the Common law Courts and that of the Courts of Equity—still co-exist, has been plainly demonstrated within the last few years by a much litigated specific performance case,[3] the outcome of which was certainly odd, but hardly gratifying to either of the parties concerned.

Briefly, the material facts were these:—

A mortgagee sold by auction a leasehold house, describing it, by a grim stroke of irony, as a "small, safe investment." The conditions of sale (which were, of course, part of the contract) required the purchaser to pay a deposit, which he did, and comprised a very strict special condition, requiring the purchaser not to make any objection in respect of a

[1] *Stewart* v. *Kennedy* (15 App. Cas., at p. 102).
[2] Farwell, J., in *Rudd* v. *Lascelles* ([1900], 1 Ch., at p. 819).
[3] *Scott* v. *Alvarez* ([1895], 1 Ch. 596; 2 Ch. 603, 614).

certain "intermediate" part of the title, and to assume that a certain deed of assignment vested a good title in the assignees.

Some time afterwards the purchaser happened to discover, and he was able to prove, that the "intermediate" title was utterly bad, that the deed of assignment passed no title to the assignees, and that the vendor could not give him even what is called a holding title. Naturally, he declined to complete his purchase.

The vendor sued for specific performance.

The purchaser counterclaimed for the return of his deposit.

The Court of Appeal came to the noteworthy conclusion that it could give no relief to either party;—not to the vendor, because, the granting of the equitable remedy of specific performance being discretionary, a Court of Equity (which the Supreme Court is) would not compel the purchaser to take a title which was shown to be bad; and not to the purchaser, because, looking at the matter through the spectacles of a Court of Common law (which also the Supreme Court is) the unlucky purchaser was bound by the special condition, and accordingly, there having been no actual breach of contract by the vendor, could not maintain a Common law action to recover the deposit.

So the purchaser escaped from the "small, safe investment," but at the cost of losing his deposit (to say nothing of his costs of the litigation), although he had been in no way in fault; a result which I respectfully follow one of the Lords Justices who decided the case, in characterizing as "not satisfactory."

And now, though there are many branches of my subject which I have not even touched, regard for time and your patience warns me to conclude.

In doing so, I cannot help harking back to the thought with which I began—the pity of it that, in this country

and in these days, there should be everyday occasion and need for the exercise by Courts of Justice of that elaborately systematised jurisdiction, in relation to the specific performance of contracts, some features of which I have endeavoured to set before you.

The truth is, I am afraid, that Carlyle put the matter in a nutshell, when he wrote,[1] "If all men were such that a mere spoken or sworn contract would bind them, all men were then true men, and Government a superfluity. Not what thou and I have promised to each other, but what the balance of our forces can make us perform to each other: that, in so sinful a world as ours, is the thing to be counted on."

W. DONALDSON RAWLINS.

V.—LORD CHANCELLOR LOUGHBOROUGH.

"AS for Mr. Wedderburn there is something about him which even treachery cannot trust." Of the many stinging utterances, with which Junius lashed his contemporaries, there is none which cuts more deeply than the words just quoted. Alexander Wedderburn was a young Scotsman, who, commencing with no external advantages, climbed the laborious ascent which leads to the English woolsack. In the course of his toilsome career, he changed sides on several occasions in a way which so manifestly resulted in his own advantage, that his contemporaries refused to believe that he was actuated by principle or by any thing other than ambitious self-seeking. He had the consuming Scottish desire to "get on," and perhaps he thought the end at which he aimed worth more than a reputation for public virtue. In spite of the demerits of his political conduct, he presents a picturesque and striking figure. He

[1] *French Revolution*, Part II, Book I, Chapter 7.

was associated with many historic events. He was counsel in the Douglas Cause and in the Duchess of Kingston's Case. He tried the rioters implicated in the No-Popery outburst under Lord George Gordon. As Chancellor, he pronounced the acquittal of Warren Hastings. He was greatly admired by the lawyers of his day, who were proud of having as their head a man who adorned the profession by his eloquence and brilliant intellect. He was a gentleman *par excellence*, "wholly above any sordid feelings of avarice or parsimony," as Brougham says, "and only valuing his high station for the powers which it conferred, and the dignity with which it was compassed round about." He had brilliant talents, and extraordinary tenacity and determination of character. The fatal defect, that vitiated his character and career, was his complete lack of principle and public virtue. He made no sacrifices to patriotism and left behind him no monument of service to the nation. He helped to brand upon his fellow countrymen that reputation for unscrupulousness and selfish want of principle, which was a commonplace among politicians in the eighteenth century. "Like the generality of Scotch," says Lord Shelburne in his autobiography, "Lord Mansfield had no regard to truth whatever." It was Wedderburn, and his like, that gave a justification for such a remark as that.

Alexander Wedderburn was born in Edinburgh in 1733, and was the son of Peter Wedderburn, a Judge of the Scottish Court of Session, who bore the judicial title of Lord Chesterhall. After a sound education, he entered the profession of the law, and was called to the Scottish bar in June 1754. While studying for the calling of an advocate, he seems to have formed the ambition of migrating to the larger world in the South. He went up to London, where he met his brilliant countryman, Mr. Attorney-General Murray, and entered himself as a member of the Inner Temple in May 1753. His larger ambitions did not prevent

him from first trying his fortune in his native land. Following the example of many young advocates desirous of displaying their abilities, he entered the General Assembly of the Kirk of Scotland. He speedily gained a reputation for eloquence, and signalised himself by defending David Hume the historian, who had been attacked for propagating atheistical opinions. When the appearance of *The Tragedy of Douglas*, by the Reverend John Home of Athelstanford, raised a second *furore*, he spoke in the General Assembly in defence of the theatre, giving proof even then of remarkable abilities. The young advocate was an active member of the "Select Society," an association formed in Edinburgh for the purpose of discussion, which included amongst its members, Adam Smith, David Hume, the Duke of Hamilton, Robertson the historian, the Earl of Lauderdale, Home the author of *Douglas*, and the Earl of Bute, who afterwards became Prime Minister. In 1755 the intellectual activity of the Scottish capital found vent in the issue of a magazine called *The Edinburgh Review*, and Wedderburn, at the age of twenty-two, became editor. The staff included Adam Smith, Robertson and Blair, who were all familiar associates of Hume. The religious antipathy towards Hume was so great that his friends refrained from imparting their plans to him or inviting him to join them. The mere suspicion that Hume was concerned in the publication, however, was sufficient to damn its chances of success, and the magazine did not get beyond its second number, published in January 1756. *The Edinburgh Review* disappeared, to be followed nearly half a century later by the more famous venture planned in Buccleuch Place by Jeffrey and his friends in 1802. Wedderburn seems to have ultimately become convinced that Edinburgh was not a fitting sphere for his abilities. Ambitious, cultivated, broad-minded, he longed for wider scope and a larger world. In 1757 he quarrelled in Court with Lockhart, the leader of the

Scottish bar, and refused to apologise. Whether premeditated or not, this step brought his career at the Scottish bar to a close, and, coming up to London, he took his place at the foot of the ladder which led him to the woolsack.

To understand the early life of Wedderburn in London, it is necessary to remember that he was a Scot, and entered upon his career at a time when his countrymen were intensely unpopular in England. With the accession of Lord Bute to power in 1762, a fierce outburst of hatred towards Scotland and the Scots had flamed forth. A feeling of dislike towards the northern nation long existed in the minds even of cultivated men. Lord Brougham says that George III constantly betrayed "a very marked prejudice" against Scotchmen and Scotch politics, and he mentions it as a merit in Lord Holland, that he did not share that feeling of contempt for Scotchmen that was felt by the Whig leaders, Fox and General Fitzpatrick, Mr. Hare and Lord John Townshend. The Scottish poets and philosophers were sneered at and despised. Scottish poverty was an endless source of jest. English readers gloated over such lines as those of Churchill:—

"Jockey, whose manly high-boned cheeks to crown,
With freckles spotted, flamed the golden down,
With meikle art could on the bagpipes play
E'en from the rising to the setting day;
Sawney as long without remorse could bawl
Home's madrigals, and ditties from Fingal;
Oft at his strains, all natural though rude,
The Highland lass forgot her want of food,
And whilst she scratch'd her lover into rest,
Sunk pleased, though hungry, on her Sawney's breast."

In *The Man of the World*, Macklin delighted the populace of London by painting the Scotch in the most odious light in the character of Sir Pertinax MacSycophant. When the passion for representing the plays of Shakespeare in costumes, that were historically accurate, was at its height, it was suggested that Macbeth should wear tartan instead of

the modern military dress. Garrick declined the proposal, not because he considered it historically incorrect, but because the appearance of the Scotch dress would be certain to damn the piece.

Poor Boswell had to listen to many gibes and flouts at his nationality. "Pray, Boswell," said Wilkes on one occasion, "how much may be got in a year by an advocate at the Scotch bar?" "I believe, two thousand pounds," replied Boswell. "How can it be possible to spend that money in Scotland?" asked Wilkes. "Why, sir," said Johnson, joining in the conversation, "the money may be spent in England; but there is a harder question. If one man in Scotland gets possession of two thousand pounds, what remains for all the rest of the nation?" "You know," added Wilkes, "in the last war, the immense booty which Thurot carried off by the complete plunder of seven Scotch isles; he re-embarked with *three and sixpence*." Scots who had prospered in England had to listen to endless jests on their early poverty. James Allan Park, for example, who became a distinguished judge, was satirised in some well-known lines:

"James Allan Park,
Came naked stark
From Scotland;
Now hath he cares,
And breeches wears,
In England."

The large number of Scots who held important posts in England was a particular source of offence. When, at one of those pessimistic political conversations, so dear to Englishmen, somebody lamented, "Poor old England is lost," Dr. Johnson replied, "Sir, it is not so much to be lamented that old England is lost, as that the Scotch have found it." When Dr. Ogilvie praised the noble wild prospects of Scotland, Dr. Johnson remarked that the noblest prospect which a Scotchman ever sees is the high

road that leads him to England. In 1772 some of the city friends of Wilkes sent in a remonstrance praying the king among other things not to admit any Scotchmen again into the administration.

The extraordinary tenacity and perseverance of the Scots was one source of their unpopularity. One of the best examples of the successful Caledonian was Lord Glenbervie, who, beginning life as a surgeon, subsequently became a barrister, and ultimately a peer and son-in-law to Lord North, the Prime Minister. Lord Ellenborough used to call Glenbervie "the Solicitor-General," because he always asked for everything that became vacant. Ellenborough used to swear that Glenbervie kept a Scotchman at half-a-crown a week, who was always on the look-out, and who sat up all night in order that he might call Glenbervie, if any one died in office. Lord Brougham relates that when the Kingdom of Etruria was announced by Napoleon, and no one for some time was named, he and his friends were speculating who was to have it. "Don't you know?" said Ellenborough. "Glenbervie has asked for it and has great hopes." The same phenomenon has been repeated in many Scottish lawyers. Lord Brougham has related how "Jock Campbell," when fighting his way to the woolsack, "pestered" him with "his everlasting applications for something for himself or his connexions," and of his "insane desire to better himself." This trait, as much as any other, may explain why, as Bagehot says, "all men are arid towards young Scotchmen."

In 1757 Wedderburn commenced his career in London, richly endowed with the tenacity and perseverance of his countrymen, and fully conscious of the disadvantages attaching to his nationality. He took a small set of chambers in the Temple, and faced the world with an invincible determination to succeed. His first step was to divest himself of his broad Scottish accent. There was a mania

among the Scottish upper classes of that day for the acquisition of the English accent. A society was actually formed in Edinburgh for the purpose of promoting the reading and speaking of the English language in Scotland, which included among its directors Robertson the historian, and the Earls of Errol, Eglinton, Elgin and Galloway. The society engaged an English teacher, but the ridicule aroused by its operations proved fatal to its existence. James Boswell took lessons in English pronunciation from Mr. Love, of Drury Lane Theatre, and Mr. Sheridan, the father of the statesman, and was complimented, because Dr. Johnson said to him, "Sir, your pronunciation is not offensive." Wedderburn, when he took up residence in London, studied English pronunciation under Mr. Sheridan and Mr. Macklin, an Irish actor. He laboured at his task of acquiring the English accent with invincible industry. "We do our best to polish—polish—polish"! said old Mr. Turveydrop, in *Bleak House*, of his son's dancing academy. For months Wedderburn's whole aim seems to have been to polish—polish—polish, and in the end he appears to have been fairly successful in getting rid of the accent of his country. He was more fortunate in this respect than Lord Jeffrey, whose artificial tones gave rise to the remark, that, though he had lost the broad Scots, he had only gained the narrow English. But even Wedderburn's speech was always precise and affected, requiring perpetual attention and imposing perpetual constraint. Boswell says that Wedderburn always retained sufficient of his "native wood-note wild" to mark him as a Scotsman, and Lord Brougham relates that in his old age, when his mental vigour was impaired, his Scotticisms and vernacular tones returned, showing that his avoidance of his native accent involved an effort which could not continue when his attention was relaxed and his powers enfeebled.

Wedderburn did not propose to succeed at the Bar by

laborious days and nights. If he burnt the midnight oil, it was in gay society and amidst witty companions. He attached himself to his countryman, Lord Bute, who in 1762 became Prime Minister. He was often at the theatre and consorted much with actors. He cultivated literature, but he did not allow his love of letters to allure him from his legal pursuits, as Murphy and others had been led away. He was always avid of briefs, and it was said of him that he disregarded professional etiquette in his desire to make headway at the Bar. Boswell took the opinion of Dr. Johnson on the question whether Wedderburn had behaved unworthily in canvassing for briefs through the agency of Strahan, the Scottish bookseller in the City. "If I were a lawyer," said Johnson, "I should not solicit employment; not because I should think it wrong, but because I should disdain it." Wedderburn's fortunes rose with the increasing power of his patron, Bute. He was returned by Bute's influence as Member of Parliament for the Ayr burghs, and proved a staunch supporter of his countryman. When Bute's unpopularity aroused the outburst against the Scots, Wedderburn is said to have taken up the cudgels for his nation in anonymous publications. He was bitterly attacked by Churchill in the *Rosciad*:—

"To mischief train'd, e'en from his mother's womb,
Grown old in fraud, though yet in manhood's bloom,
Adopting arts by which gay villains rise,
And reach the heights which honest men despise,
Mute at the bar, and in the senate loud,
Dull 'mongst the dullest, proudest of the proud,
A pert, prim, prater of the Northern race,
Guilt in his heart, and famine in his face."

Wedderburn never seems to have had the regular connexion and steady flow of business which the ordinary stuff-gownsman so much desires. He was retained now and then in sensational cases, especially where authors and actors were involved. But it was not until he had taken

silk in 1763 that he found the ground firm and solid beneath him. After he became a King's Counsel, he took a step which involved a grave breach of the unwritten law of the profession. He had not hitherto joined any circuit, and, on taking silk, he appeared for the first time on the Northern circuit. Sir Fletcher Norton, who had just been made Attorney-General, had left much business to be struggled for, and Wedderburn made matters worse by engaging Norton's clerk. Wedderburn argued that he had a perfect right to join a circuit at any time after call, but this view did not commend itself to the Northern circuiteers, and they resolved to boycott him in the usual manner. The action of a single member of the circuit prevented their action proving effective. There was amongst the stuff gownsmen a barrister named Wallace, hard-working, stingy, ill-natured, and unpopular. He had been clerk to an attorney at Penrith in Cumberland, whose daughter he had married, and his manners were vulgar and unrefined. Wallace, anticipating that, if he alone consented to hold briefs with the boycotted Wedderburn, he would be invariably retained as his junior, declined to join in the measures directed against the intruder. His refusal prevented concerted action, and Wedderburn was ultimately permitted to appear as he pleased. Wedderburn's conduct in forcing himself upon his unwilling brethren, proved of little use in helping him on the path of professional advancement. After attending Assizes for two or three years, he ceased to go circuit, and his breach of professional etiquette only gave one more weapon to those who accused him of unscrupulous self-seeking.

Failing to establish himself at the Common law Bar, Wedderburn devoted himself to the Court of Chancery, where he had as his rival the leonine Thurlow. Thurlow's frown and overbearing demeanour, however, had no terrors for Wedderburn. The self-confident Scot always stood up

to his rival, and Thurlow, like all bullies, was at heart a coward. The *Rolliad* puts an odd stanza into Thurlow's mouth.

> "Damn Sheridan's wit, the terror of Pitt;
> Damn Loughborough, my plague—would his bagpipe were split!"

Wedderburn was employed in almost every Scottish appeal in the House of Lords and was counsel in the famous Douglas Cause. "Mr. Alexander Wedderburn (for the Hamiltons)," says Horace Walpole, "spoke with greater applause than was almost ever known."

Wedderburn, as a politician, had a varied career. Beginning, as it has been stated, as a supporter of the Tory Bute, he transferred his support, after the Scottish Prime Minister's fall, to Wilkes and Liberty. No one pleaded more earnestly for the sanctity of the Common law in the House of Commons, and Wedderburn acquired great credit by his support of the Apostle of Liberty. So popular did he render himself by his declamations against placemen and turncoats, that he is even said to have inspired Wilkes with a short-sighted and unnecessary jealousy. When he was compelled to resign his seat for Richmond, to which he had been presented by Sir Lawrence Dundas, he became immensely popular as a martyr to the Cause of Freedom, and was at once presented to another constituency by Lord Clive. But the offer of the post of Solicitor-General in 1771 induced him to abandon the Wilkites and join the Tory administration of Lord North. His desertion of his associates to become Solicitor-General made him as much disliked as he had previously been liked. It is said that for some time after appearing in his new post he betrayed an embarrassed air in the House, and lacked his usual fluency. It was probably with reference to this fact that Junius said, "To sacrifice a respected character and to renounce the esteem of society, requires more than Mr. Wedderburn's resolution; and though in him it was rather a profession than a

desertion of his principles (I speak tenderly of this gentleman, for, when treachery is in question, I think we should make allowances for a Scotchman), yet we have seen him in the House of Commons overwhelmed with confusion, and almost bereft of his faculties." His former associates deplored and mourned over his desertion. "I am not surprised, but grieved," said Lord Camden. "I would keep a shop," said Horace Walpole to Mason, "and sell any of my own works that would gain me a livelihood, whether books or shoes, rather than be tempted to sell myself. 'Tis an honest vocation to be a scavenger; but I would not be Solicitor-General." The lines of Churchill, written about him ten years before, were recalled and quoted:

> "Adopting arts by which gay villains rise,
> And reach the heights which honest men despise."

Junius voiced the general indignation at Wedderburn's duplicity in the words already given. "As for Mr. Wedderburn, there is something about him which even treachery cannot trust."

Wedderburn proved a brilliant supporter of Lord North. Thurlow and he were the Jachin and Boaz which supported the Tory administration. The sonorous description of the Prime Minister and his two henchmen, given by Gibbon, who was then a member of the House of Commons, is familiar. "The cause of Government," says the great historian, "was ably vindicated by Lord North, a statesman of spotless integrity, a consummate master of debate, who could wield with equal dexterity the arms of reason and of ridicule. He was seated on the Treasury bench, between his Attorney and Solicitor-General, *magis pares quam similes*; and the minister might indulge in a short slumber, whilst he was upholden on either hand by the majestic sense of Thurlow, and the skilful eloquence of Wedderburn."

As Solicitor-General Wedderburn took part in the famous enquiry of which Benjamin Franklin was the hero or the

villain, according to the light in which the matter is viewed. At the commencement of the American revolt, certain private letters of Hutchinson, Governor of Massachusetts, and his brother-in-law, Andrew Oliver, Lieutenant Governor, had been published through the agency of Franklin. In these letters "severe and destructive measures" towards the Americans were advocated, and so great was the indignation in the colonies, that the people of Massachusetts sent a memorial to the King asking for the removal of Hutchinson and Oliver. The memorial was referred by the King to the Privy Council, and Wedderburn appeared as legal assessor to the Council. It was alleged that the letters had got into Franklin's hands by dishonourable means, and had been improperly used by him. Franklin was present at the enquiry and was violently attacked by Wedderburn. The Solicitor-General said that the object of the "hoary-headed traitor" was to embroil Great Britain and America. He called Franklin "a man of three letters," which was the jesting description of a thief among the old Romans. Either Franklin had obtained the letters by fraudulent or corrupt means, argued Wedderburn, or he had stolen them from the person who stole them. Franklin had forfeited all respect by his conduct. People would hide their papers from him in future and lock up their *escritoires*. The Solicitor-General indulged in fierce invectives against the recalcitrant colonials, which were loudly applauded by the members of the Privy Council, and greeted with cries of "Hear him, hear him." The face of Lord North, the Prime Minister, who was present, alone retained an appearance of becoming gravity. The applause of the Privy Council was repeated by the outside world, and served to increase and intensify the hostile feeling against the Americans, which ultimately resulted in the separation of the two countries. Franklin affected to treat Wedderburn's outburst with contempt. "I should think myself," he said to a friend, "meaner than I

have been described, if anything coming from such a quarter could vex me." But the attack rankled, and a curious tale is told of the manner in which Franklin gratified his desire for revenge. When attending the enquiry he was dressed in a full dress suit of spotted Manchester velvet. He carefully laid aside this suit, and specially donned it, when he signed the preliminaries of the treaty, by which Great Britain acknowledged the independence of the United States in 1782. Lord St. Helens, one of the plenipotentiaries, "could not speak," says Earl Russell in his *Memorials of Fox*, "without indignation of the triumphant air with which Franklin told them he had laid by and preserved his coat for such an occasion."

It is unnecessary to go into the detail of Wedderburn's political career. In 1778 he became Attorney-General, and in 1780 Chief Justice of the Common Pleas, with the title of Lord Loughborough, by which he is best known. When Lord North formed the coalition with Fox in 1783, to throw out Shelburne, Loughborough joined Lord North in his manœuvre, and became First Commissioner of the Great Seal. The coalition lasted but a few months, and at the end of 1783 Lord Thurlow received the Great Seal from Pitt and became Lord Chancellor. When North retired into private life Loughborough continued to act with Fox, until 1793, when he was appointed Chancellor by Pitt, who had quarrelled with Thurlow. With his possession of the Great Seal he abandoned his former associates and became a Pittite, continuing to be Chancellor till 1801, when he retired with the title of Earl of Rosslyn.

When Loughborough ceased to hold the Great Seal, he became a hanger-on at Court. He took a villa near Windsor, and spent his time dancing attendance upon royalty. The King, although possessing no real liking or regard for him, affected to treat him with confidence, and told him that the Queen also found much pleasure in his

society, and they both desired to see him as much as possible at Court. He used to go to Weymouth when George the Third went there, and joined in the royal excursions on the water. He died suddenly of gout in the stomach in January, 1805. On hearing of his death, the King, after having made sure that the report was really true, remarked, "Then he has not left a greater knave behind him in my dominions." The King had always suspected him. When he was Attorney-General, George had written to Lord North, "Is Mr. Attorney-General really running right? I doubt all Scots, and he has been getting everything he could."

Loughborough, as Lord High Chancellor, acted the part to perfection. He had "the grand manner." He was polite, but not with the ominous courtesy of Lord Campbell. "I knew Jock Campbell meant to hang him from the first," said a barrister present at Palmer's trial for murder at Stafford, "he was so confoundedly polite to the prisoner." Loughborough made a universal habit of courtesy, and was never led away by ill-temper or prejudice or favouritism. By his patience, his impartiality, his great dignity of manner, and his highly cultured mind, he threw a grace over the administration of justice, which did not belong to it under some of his predecessors. His morals were unimpeachable, and he was above the slightest suspicion of corruption. His style of living was on an imposing scale. He had a fine house in Lincoln's Inn Fields, and a splendid villa at Mitcham in Surrey, which had been presented to him by Lord Clive. He spent the whole of his official income on show. His retinue of servants was numerous, and his banquets princely. Lord Campbell says that he never stirred abroad without two splendid carriages, exactly alike, drawn by the most beautiful horses—one for himself and another for his attendants. He told Lord Haddington that the day he was made Solicitor-General he ordered a

service of plate, which cost him eight thousand pounds. Though fond of splendour, he was a Scot, and never exceeded his income.

Like many eloquent advocates, Loughborough was said to possess but a superficial knowledge of law. He did not aspire to be a great jurist. He had none of that love for legal learning which makes famous judges. When not engaged at the bar or on the bench, he devoted himself to politics or the theatre or society. He did not attempt to attain the woolsack by profundity of legal knowledge, but by oratory and political intrigue. "That damned Scotchman," said Thurlow, "has the gift of the gab, but he is no lawyer." After Thurlow's retirement from the woolsack, Sir John Leach, then a young barrister, but afterwards Master of the Rolls, used to visit him in the evenings and tell him how Loughborough had conducted himself in the Court of Chancery in the morning. Loughborough's brother judges loved to indulge in sly hits at his supposed ignorance of law. Lord Ellenborough was once dining at the house of one of the judges, and, in the drawing-room after dinner, spent an unduly long time in conversation with his host. The hostess, becoming impatient, intervened in the colloquy and said to Ellenborough, "Come, my Lord; do give us some of your conversation—you have been talking law long enough." "Madam," said the Lord Chief Justice, "I beg your pardon; we have not been talking law, or anything like law. We have been talking of one of the decisions of Lord Loughborough.

It has been already said that he was a man of singular eloquence. His oratory was equally striking in the Law Courts and in Parliament. Fox described his speech as counsel in the Douglas Cause as the finest he ever heard on any subject. "His judicial oratory," says Butler, "was exquisite. The greatest detractors from his merit acknowledged the perspicuity, the luminous order, and

chaste elegance of his arguments. Like Lord Camden, he frequently and successfully introduced law phrases into them." He took great pains to be master of any subject on which he proposed to deliver an important speech. He had the physical advantages which were necessary to an orator—a sweet and powerful voice, an expressive countenance, and a graceful manner. Although low in stature, his appearance was dignified. His strength lay, as Lord Brougham has said, in dealing with facts. He had a genius for narrative, for arguing upon probabilities, for marshalling and sifting evidence. He excelled in the lucid and perspicuous arrangement of the facts of a case. His eloquence had not the depth and profundity of great orators like Burke. It was rather that suggested in the lines addressed by Lord Lytton to Sheridan:—

> "If eloquence can find its surest test
> In the degree to which it thrills the breast,
> And not the enduring thought, which after-calm
> Retains, then thine the sceptre and the palm."

Loughborough did not produce the enduring thought. He rather won his way by his skilful arrangement of facts, his elegance of gesture and manner, his tuneful voice, and his ability to attune himself to the prevailing tone of his audience. Loughborough himself was not unconscious of the somewhat superficial nature of his oratory. When he delivered an eloquent defence of Lord Clive in May, 1773, Clive was very desirous to have his advocate's vindication of him revised and printed. But Loughborough refused to issue an edition of his speech, contenting himself with the praise of the newspapers.

Loughborough was, if not in his later life, at all events in early life, a lover of letters. The traditions of the Scotch Bar, at which he received his youthful training, were literary. When Guy Mannering enters the library of Pleydell the advocate, he finds him surrounded by the best editions of

the best authors, and in particular an admirable collection of classics. "These," said Pleydell, "are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." The eloquence of Loughborough was that of a cultured scholar. Like Gibbon he admired Pascal, and, when a young man, translated his *Letters* twice over with his own hand. He loved the society of literary men, and proved an efficient patron of learning. He procured the pension for Dr. Johnson; he procured the post of Lord Commissioner of Trade and Plantations for Gibbon; he offered to contribute to relieve the embarassment of Edmund Burke's affairs, before the great orator received his pension. Thomas Sheridan, who had given lessons in English pronunciation to Loughborough, complained that his quondam pupil had not proved grateful. But anyone who knows anything of that unendurable old Irishman will pay little regard to his ill-natured grumbling. Macklin the actor, who shared with Sheridan the credit of Loughborough's English accent, told a different story. "Macklin, I suppose," said Boswell, "had not pressed upon his elevation with so much eagerness as the gentleman who complained of him."

Strangely enough, Loughborough did not succeed in commending himself to the literary world. Gibbon, it is true, admired the Chancellor. Writing of the Assize of Jerusalem, in his *Decline and Fall of the Roman Empire*, he states: "For the intelligence of this obscure and obsolete jurisprudence I am deeply indebted to the friendship of a learned lord who, with an accurate and discerning eye, has surveyed the philosophic history of law. By his studies posterity might be enriched; the merit of the orator and the judge can be *felt* only by his contemporaries." But while Gibbon admired, Burke and Johnson distrusted. Burke, although friendly at one period with Loughborough,

once admitted *"I always respect and sometimes dread his* talents." Johnson observed towards Loughborough an attitude of neutrality, but in his heart he felt something like contempt for his want of principle. The Chancellor did not shine in conversation. "I never heard anything from him in company," said Johnson to Boswell, "that was at all striking." Foote once asked: "What can he mean by coming among us? He is not only dull himself, but the cause of dullness in others." Loughborough was not given to indulging in wit or humour. He grievously offended Miss Burney by objecting to the Brangtons in her *Evelina*, as being "too low and vulgar." She forgave him, however, "in consideration of his being a Scot, and therefore like a blind man criticising colours."

Loughborough was a man of no fixed principles; he was entirely self-seeking and unscrupulous about the means of attaining his ambitions. The most that can be said in mitigation is that, like Dugald Dalgetty, he always remained true to the colours under which he served for the time being, not seeking to gratify personal vanity or to gain separate or personal objects. Perhaps he had imbibed something of the spirit which animated the Scottish soldiers of fortune in the seventeenth century. "I had swallowed without chewing in Germanie," said Sir James Turner, a typical Scottish adventurer, "a very dangerous maxime which militarie men there too much follow, which was that so we serve our master honnestlie, it is no great matter what master we serve." Loughborough was always faithful to the standard under which he was enrolled for the time, and retained and enjoyed no higher fame than that which attaches to the successful mercenary.

J. A. LOVAT-FRASER.

VI.—SOME DECISIONS UNDER THE COMPANIES ACTS 1862—1900.

(*Continued from Vol. 28, page 467.*)

"WHERE a person makes to another the representation, 'I take upon myself to say such and such things do exist,' and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that between these two parties their rights should be regulated, not by the real state of facts, but by that conventional state of facts which the two parties agree to make the basis of their action" (*per* Lord Blackburn, in *Burkinshaw* v. *Nicolls*, 39 L. T. Rep., N. S., 312; 3 App. Cas. 1026). (8) The doctrine of estoppel has a much more limited application in criminal proceedings than in civil (*Best on Evidence*, p. 455); a position that seems historically necessary from estoppel having long been regarded, to use the language of Lord Eldon in *Evans* v. *Bicknell* ([1801], 6 Ves., at p. 183), as "a very old head of equity." (9) The doctrine of estoppel "was notably discussed in *Jordan* v. *Money* (5 H. L. Cas. 185), to which Lord Selborne was constantly in the habit of referring" (*per* Lord Macnaghten, in *George Whitechurch, Ltd.* v. *Cavanagh*, 85 L. T. Rep., at p. 353).

Some terms of French law were noted and explained in *George Whitechurch, Ltd.* v. *Cavanagh.* The appellant obtained from the French Courts "a process known as an "opposition," together with "a protective seizure," against a company managed by the principal agent of the fraud. The effect of such a process is to lay an embargo on the debtor's business, without however giving the creditor who obtains it any priority" (*per* Lord Macnaghten, *ibid, supra*, at p. 352).—"*Saisie*," or protective seizure, can be partially withdrawn, so as to allow the dealing by the debtor with such goods as the creditor sanctioned; the man in possession remaining to enforce the seizure in all other respects;

(*cf.* observations of Lord Robertson, in *George Whitechurch, Ltd.* v. *Cavanagh*, 85 L. T. Rep., at p. 354).

In *Lindley on Companies* (Vol. 1, p. 456), it is stated that the exact nature of the covenant implied by the memorandum and articles of association "is even now very difficult to define; but it is now settled that it is not equivalent to a contract between the company on the one part and the member on the other, on which either a member can sue the company or the company can sue a member. In *Buckley on the Companies Acts* it is also considered that the articles are not a contract between either a director and the company, or a member and the Company (7 *ibid.*, pp. 22, 53, 556). "There is no contract in terms between the individual members of the company" (*per* Lord Herschell, in *Welton* v. *Saffery* [1897], A. C., at p. 315). "That having regard to the construction to be put upon sect. 16, in *Eley* v. *Positive Life Assurance Co.* and subsequent cases, it must be taken as settled that the contract upon which he (a member of the company) relies, is not a contract upon which he can maintain any action, either on the Common law side or in equity" (*per* Lord Lindley, then Lindley, L.J., in *Browne* v. *La Trinidad* [1888], 37 C. D., at p. 14). But Mr. Beaufort Palmer contends that "it seems a notable departure from the plain terms of sect. 16 of the Principal Act, and inconsistent with *Welton* v. *Saffery* ([1897], A. C. 315), and with *In re Northumberland Avenue Hotel Co.* ([1886], 33 C. D. 16), to maintain that articles of association do not bind a company in favour of a member" (*Company Law*, p. 33). But Mr. Palmer transcribes a passage from the judgment of Lord Herschell, in *Welton* v. *Saffery*, cited above, which shows that this was his opinion. Mr. Palmer also seems to consider that there is great difficulty in ascertaining the cases referred to by Lord Lindley, in *Browne* v. *La Trinidad* ([1888], 37 C. D. 1), decided subsequently to 1876, the date of *Eley* v. *Positive*

Life Assurance Co. (1 Ex. D., p. 88), in which it was held that the regulations do not constitute a contract between the company on the one part and the members on the other. In *Buckley on the Companies Acts* (p. 53), there are several cases cited in which it was held that the articles do not constitute a contract between a director and a company. In all these cases the director was also a shareholder or member of the company. If the question, whether the articles constitute a contract between the company and its members, be considered one of those *apices juris* which are unattainable, there must be no doubt that preference shareholders created by special resolution can sue the company, when they are not members of the company, and they are entitled under the company's regulations to priority in payment. The special resolution creating the preference shares cannot alter the articles; though it is "always competent to a company to alter original articles of association by special resolution under the powers conferred by sects. 50 and 51 of the principal Act of 1862. A company cannot deprive itself of this power. See *Malleson* v. *National Insurance and Guarantee Corporation* ([1894], 1 Ch. 200), and *Walker* v. *London Tramways Co.* ([1879], 12 Ch. D. 705)," (*per* Lord Lindley, then Lindley, L.J., in *Andrews* v. *Gas Meter Co.* [1897], 1 Ch., at p. 369). In a case decided last year, *Bond* v. *Barrow Hæmatite Steel Co.* (86 L. T. Rep., N. S., p. 10), it was held, on the constructions of the articles of association and special resolutions creating preference shares, that the resolutions did not alter the articles, and that the articles conferred no further rights than a priority in payment; and further, that there were no profits out of which payment could be made. That that depended on the circumstances of each case, the nature of the company, and the evidence of competent witnesses. Fixed capital might in some cases be sunk, while circulating capital must be kept up. That the actual loss was of

this kind, and, as to the estimated loss, the plaintiffs had *failed to show that it was fixed capital, which in a company of this nature might be sunk.* In no case had the Court compelled directors to pay dividends when they had expressed an opinion that the state of the accounts did not admit of such payment. The declaration of a dividend is a condition precedent to an action to recover (*Lindley on Companies*, Vol. 1, p. 609); and it is obvious that a declaration of dividend is essential where a reserve fund article applies: "for the shareholder has no right to any payment until the corporate body has determined that the money can be properly paid away" (*per* Farwell, J., in *Bond* v. *Barrow Hæmatite Steel Co.*, 86 L. T. Rep., at p. 13).

Preference shareholders who have no votes come in on the terms "that they are at the mercy of the company." If, however, they had a right to recover, even where there was no declaration of dividend, this "would certainly lead to great inconvenience in enabling them (such preference shareholders) to compel the payment out of the last penny without carrying forward any balance" (*ibid.*, at p. 13). "Interest is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course, and not by way of advance. Interest is compensation for delay in payment, and is not properly applied to a share of profits of trading, although it may be used as an inaccurate mode of expressing the share of such profits" (*per* Farwell, J., *ibid.*, at p. 13). "A right to interest cannot create a right over-riding the valuable and possibly essential article providing for reserve funds." It is a question of considerable difficulty on the authorities what is "capital" and what is "profit." "The mode and manner in which a business is carried on and what is usual, or the reverse, may have a considerable influence in determining what may be treated as profit and what as capital" (*per* the Earl of Halsbury, L.C., in *Dovey* v. *Cory*, 85 L. T.

Rep. 257, at p. 259; [1901], A. C. 486). "It may safely be *said that what losses can be properly* charged to capital and what to income is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ" (Farwell, J., in *Bond* v. *Barrow Hæmatite Steel Co., Ltd., ibid., supra,* at p. 13, referring to *Gregory* v. *Patchett* ([1864], 33 Beav. 595). "There is no hard and fast legal rule on the subject" (*per* Lindley, M.R., *Re National Bank of Wales, Ltd.,* 81 L. T. Rep. 363; [1899], 2 Ch. 629).

It is required by Statute that dividends should not be paid out of capital. Such payment is regarded as a reduction of capital, and no such reduction is allowable, unless sanctioned by the Court under the Companies Acts 1867 and 1877. "The Companies Act 1862 makes no provision as to reduction of capital." The theory of that Act was and is that the limited capital, the creditor's only fund, is to be irreducible, inviolable (*Palmer on Companies,* p. 73). "The Acts of 1867 and 1877 have not abolished, but have only introduced, certain exceptions to the rule that a company may not reduce its capital." The rule that dividends may only be paid out of profits is contained in the regulations of the company, and is provided by Table A. It is "not an identical but a diverse proposition" to the statutory requisition that dividends must not be paid out of capital. A balance to the credit of profit and loss account may never become capital, although when it accrued there was an estimated deficiency in the value of its capital assets, because the latter may subsequently increase in value. Such a balance may be available for dividend, even when it is not profits. "There is nothing in the Statutes requiring a company to keep up the value of its capital assets to the level of its nominal value" (*per* Lord Lindley, in *Lee* v. *Neuchatel Asphalte Company* [1889], 61 L. T., p. 11).

Hence a balance to the credit of a profit and loss account does not "automatically become part of the capital assets, because the value of the actual capital assets is depreciated to an amount equal to or exceeding such balance" (*per* Farwell, J., in *Bond* v. *Barrow Hæmatite Steel Co., Ltd.*, *ubi supra*, at p. 14). Whether dividends can be paid depends not on the condition of the capital assets but on whether there are available profits. Whether there are available profits depends (1) on the circumstances of the particular case; (2) the nature of the Company; (3) the evidence of competent witnesses.

There is no single definition of the word "profits" which will fit all cases. According to a definition of Professor Marshall, profits are the excess of receipts over outlay for the year, taking into account the annual increase or decrease of the value of "stock and plant." But "stock and plant," or capital assets, may be either fixed or circulating capital. "Fixed capital may be sunk and lost, and yet the excess of current receipts over current payments may be divided; but floating or circulating capital must be kept up" (*per* Lord Lindley, in *Verner's Case*, 70 L. T. Rep. 516; [1894], 2 Ch. 239). But "it is not a general or universal rule that in every company fixed capital may be sunk and lost" (*per* Farwell, J., in *Bond* v. *Barrow Hæmatite Steel Company, Limited*, 86 L. T. Rep., at p. 14). All the authorities agree that circulating capital must be kept up. In the case of a company smelting ore—leases, blast furnaces, and cottages are regarded as circulating capital—in legal contemplation "they are mere accessions to the ore." Loss of capital may be either actual loss or depreciation by estimate; but decided cases do not distinguish between realised and estimated loss.

In the case under consideration, Farwell, J., considered that, even when a company owns wasting property, it may create a depreciation fund: the decision in *Lee* v. *Neuchatel*

Asphalte Co. (61 L. T. Rep. 11), being a case where the fixed assets were larger than at the formation of the company. All that the last case decided was the particular proposition that some companies with wasting assets have no depreciation fund. It is for the Court to determine whether a particular company ought or ought not to have a depreciation fund.

In *Bond* v. *Barrow Hæmatite Steel Company*, the Court was clearly influenced by the fact that both witnesses and directors considered the company ought to have a depreciation fund. Farwell, J., commended the judgment of a director, in the spirit of Dr. Johnson's epigram on George Grenville, when the lexicographer declared that if that statesman "sometimes erred he was likewise sometimes right." And "the opinion of a director cannot always be disregarded." (*Bond* v. *Barrow Hæmatite Steel Co.*, 86 L. T. Rep., at p. 15.)

The Court has never compelled directors to pay dividends when the latter have expressed their opinion "that the statement of the accounts did not admit of any such payment." In dismissing the action with costs, Farwell, J., made the following valuable observations: "One cannot say what are profits without experts. . . . . Decided cases only deal with the distinction between floating and fixed capital, and do not distinguish between realized and estimated loss" (*ibid.*, *supra*, at pp. 12 and 15).

The case of *Aërators Ltd.* v. *Tollit* (86 L. T. Rep. 651) decided that there being no evidence of probability of deception, the plaintiff company, proceeding by injunction under the Companies Act 1862, s. 20, could not prevent another company from registering under the title of "Automatic Aërators, Limited," because that involved, on the part of the plaintiff company, claiming the monopoly of a single word in ordinary use. While the Legislature has given to a limited company a right to the exclusive use

of its identical name—thus conferring on a company a privilege not possessed by individuals—this privilege is confined to the use of names which are "identical," and does not extend to names which are only "similar."

In actions brought under the Companies Act 1862, s. 20, Farwell, J., considered the material questions are:—"(1) What business has been or is intended to be carried on by the old company and what is intended to be carried on by the new one; (2) what sort of name has been adopted by the old company? (*Aërators, Ltd.* v. *Tollit*, 86 L. T. Rep., at p. 652)." But it cannot be enough in these days, when the objects of a company are usually limited only by the number of letters in the alphabet, and extend to every form of business, whether concerned or not with the principal object, to show that the intended new company includes some similar objects." *The Manchester Brewery Company Case* (79 L. T. Rep. 645) decided that a company seeking to register under the title of an existing company, with the addition of another word, is only prohibited from registering where the use of the name proposed is calculated to deceive. "Calculated to deceive" does not point to intentional fraud. But it is a question of fact in each case, whether the name of the new company is so similar to that of the old company as to induce the belief that the two companies are identical. A company moving for an injunction under the Companies Act 1862, s. 20, cannot assert in their own name the right of the public; cannot say that there would necessarily be some confusion in the minds of the public if the whole of their title were taken; it being the exclusive privilege of the Attorney-General to assert the right of the public. The nature of the name of the existing company materially influences its chance of moving successfully for an injunction under the Companies Act 1862, s. 20. If, on the one hand, the name of the existing company is a fancy word, or the name

of a place, the existing company will probably succeed in restraining a company seeking to register under a similar name from so doing. But the existing company cannot prevent the new company from registering under a similar name when the name of the old company is descriptive only, or when such name—(1) "points rather to a machine or article than to the company, because a machine has not necessarily anything to do with the company which is named for it": (2) contains a word which is "in ordinary use in our language." In such case the existing company have only themselves to thank, and they can no more acquire a monopoly in the use of such a word than an individual can acquire a monopoly in his own name or the name of the article he manufactures. The only limitation to the rule that a company cannot assert an exclusive right to a word which is in ordinary use in our language, arises under circumstances similar to those in *Reddaway's Case* (74 L. T. Rep. 289; [1896], A. C. 199). The name of an article may lose its primary meaning, and become so identified with a company that the latter may claim an exclusive right to the use of the term. In such case, the name of the article has acquired a secondary meaning that identifies it with a certain person's manufacture, who can consequently assert his right to its exclusive use without any qualification or distinguishing characteristic.

The case against the right of exclusive use by a company of the name of an article, can be put on the highest footing when there is only one word in the English language that aptly describes an article. "It would obviously lead to the greatest inconvenience if any company could prevent all other companies from using as part of their title the one word in the English language which aptly describes the article they manufacture and deal in" (*per* Farwell, J., in *Aërators, Limited* v. *Tollit*, 86 L. T. Rep., p. 652).

The Court in the case under consideration suggested that

the words *motors* or *automobiles* are "*the only words* which represent the fashionable locomotives of the day" (*ibid., supra*). Why not kinetics or auto-kinetics? Farwell, J., also pointed out that a claim by an existing company to prevent subsequent companies from using the name of an individual associated for years with the existing company might involve an absurd result. As an illustration of this, the Court pointed out that Barclay and Co., the well-known bankers, could restrain Barclay, Perkins and Co., brewers, from using their name "on the grouud that they take the whole title of the banking firm." But such an extinction of the "potentialities of wealth beyond the dreams of avarice" might provoke Dr. Johnson to moralise in his grave on what he called "the transitoriness of fortune."

The case of *In re Leas Hotel Co., Salter* v. *Leas Hotel Co.* (86 L. T. Rep. 182; [1902], 1 Ch. 332), decided that when the goodwill of a business is included in the property charged by the debentures, the Court will appoint a receiver and manager of the business of and undertaking of the company, upon a motion by a debenture holder. Such a manager is appointed by the Court only for the purposes of realization; and the Court "always refuses the frequent application made for leave for the manager of the business appointed for purposes of realization to be continued in his management for the purpose of making a profit." The question as to whether the Court had jurisdiction to appoint a manager depended on whether the goodwill of the business was charged by the debenture. There was no express mention of goodwill or business in the charge. But the debentures charged "all the property and effects of the company." Kekewich, J., decided the case on the analogy of partnership cases—"the case of a company being, as it seems to me, the same as that of a partnership; for a company is only a special partnership authorised by the

Legislature, and it seems to me that what is true of a partnership is equally true of a company" (*In re Leas Hotel Co. &c.*, 86 L. T. Rep., at p. 183). In one of these cases, Stirling, J., considered that the goodwill was comprised in "the assets" of a partnership, because "assets" includes goodwill so far as it constitutes property. Goodwill is part, therefore, of the "property" of a partnership. "But if goodwill is part of the property of a partnership, it is part of the property of a company." *In re David and Matthews* (80 L. T. Rep. 75; [1899], 1 Ch. 378), the other partnership case referred to by Kekewich, J., in *In re Leas Hotel Co.* Romer, J., considered the words "all effects and securities" included goodwill. Kekewich, J., therefore concluded that if the words "assets" and "effects" had been held to include a goodwill, the words "property and effects" used in the charge he was considering must also include the goodwill. The Court distinguished *Whitley* v. *Challis* (65 L. T. Rep. 838) as being like a mortgage and quite distinct from the usual debenture charge. In that case no words passing the business were added, and on this ground the Court of Appeal refused to appoint a manager. The several decisions given on applications to extend the time for registration of debentures under the Companies Act 1900, ss. 14, 15, appears to warrant the following conclusions: (1) The Companies Act 1900, s. 15, is a provision of similar import to the Bills of Sale Act 1878, s. 14, providing that omission to register a bill of sale may be rectified, when it is accidental or due to inadvertence, on such terms and conditions as the judge thinks fit to direct (*per* Buckley, J., in *Joplin Brewery Co.*, 85 L. T. Rep., at p. 411). "The analogy of the Bills of Sale Act, which Buckley, J., took in *Re Joplin Brewery Company, Limited,* seems to me to be very close and precise" (*per* Cozens-Hardy, L.J., in *In re J. C. Johnson and Co.*, 86 L. T. Rep., at p. 793). "Section 14 of the Bills of Sale Act 1878 is in *pari materia* with

section 15 of the Companies Act 1900" (*per* Eady, *J.*, *in In re Spiral Globe, Ltd.*, 85 L. T. Rep., at p. 779).

(2) "The language of the Companies Act 1900, s. 15, as to extending the time for registering debentures is different from that of the Bills of Sale Act 1878 as to extending the time for registering bills of sale" (*per* Buckley, J., in *In re S. Abrahams and Sons, Ltd.*, 86 L. T. Rep., at p. 291).

In *In re Joplin Brewery Co. (ubi supra)*, Buckley, J., pointed out that the language of the provision in the Companies Act 1900, s. 15, is larger than that of the corresponding section in the Bills of Sale Act 1878, s. 14. This difference between the language of the two sections has influenced the decisions, but the saving clause as to previous rights in the orders made under the Companies Act 1900, s. 15, protects, *semble*, only execution creditors.

In *In re J. C. Johnson and Co.* (86 L. T. Rep., at p. 793), Collins, M.R., referring to the Judgment of Buckley, J., in *In re Joplin Brewery Co.* (85 L. T. Rep. 411), observed: "I am bound to say that the Judgment of Buckley, J., which purported to apply this Act on the analogy of the clause in the Bills of Sale Act, does seem in these terms rather to enlarge the area to which the Bills of Sale Act was held to be limited, for, instead of dealing with the creditors who have actually issued execution—that had been the subject of this discussion under former Acts—he says this: "The orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale." But in the same case, Cozens-Hardy, L.J., considered that the words inserted in the Order drawn up in *In re Joplin Brewery*, "were a mere transcript of the common form under the Bills of Sale Act," and therefore would probably not have any effect in protecting creditors who were not execution creditors; "*i.e.*, creditors who had not taken some proceeding to get a charge or security upon the

goods. The head note of the Report of *In re J. C. Johnson and Co.* states that: "Whether the rights of any creditors who have not actually issued execution ought to displace the rights of those debenture holders whose debentures were not registered until after his debt had accrued, *quære*" (86 L. T. Rep. 791 [1902], 2 Ch. 101). But it is clear that it is of the greatest importance to determine whether the Order drawn up in *In re Joplin Brewery* only protects execution creditors. For in *In re S. Abrahams and Sons, Ltd.* (86 L. T. Rep., at p. 291), Buckley J., said: "Except in very exceptional cases the Order extending the time for registration under the Companies Act 1900, s. 15, will contain the words as settled in *In re Joplin Brewery Co.*" The law on the subject of extension of time for registration of debentures cannot be said to be in a satisfactory state, while it remains totally uncertain whether, in most cases, the Court will grant an Order for rectifying with a reservation of the rights of creditors generally, or only of the rights of execution creditors, acquired prior to registration, but subsequently to the issue of the debentures. In *In re Spiral Globe, Ltd.* (85 L. T. Rep. 778), where the application by the debenture holder was to extend the time for registration, after the Company had passed a resolution for winding up voluntarily, and after a liquidator had been appointed, Eady, J., granted an Order under the Companies Act 1900, s. 15, protecting the rights of the whole body of creditors generally. In giving his Judgment, Eady, J., was unable to accept the view that the object of the Bills of Sale Act 1878, s. 14, was only to protect the rights of execution creditors—"the rights of persons in whom any property of the mortgagor had actually vested before the registration of the debentures."

It is curious to note that in both the *Law Reports* and the *Law Times Reports* the learned Judge is reported as thus having spoken of the registration "of a debenture" under the Bills of Sale Act (85 L. T. Rep., at p. 779; [1902], 1 Ch.,

at p. 399), when noticing the argument of Mr. Romer for the applicants. However, in *In re Standard Manufacturing Co.* ([1891], 1 Ch. 627; 64 L. T. Rep. 487), Lord Justice Bowen said, "We are of opinion, nevertheless, that on the true construction of *the Act of 1878, the mortgages or charges* of any incorporated company, for the registration of which a statutory provision had already been made by the Companies Clauses Act 1845, or the Companies Act 1862, are not bills of sale within the scope of the Bills of Sale Acts." The reason for this decision of Lord Bowen was that, in passing the Bills of Sale Acts, the Legislature designed to strike at the frauds perpetrated upon creditors by secret bills of sale. But corporate bodies then in existence were not at that date "in the habit of committing frauds of this sort." Debentures cannot be described as "secret," since they required registration at the company's office, under the Companies Act 1862, s. 43, previous to the registration now required at the registrar's office under the Companies Act 1900, ss. 14, 15. "The principal Act (of 1878), therefore, does not apply to a debenture issued by an incorporated company (*Reed on the Bills of Sale Acts*, Eleventh Edition, p. 237). In *Debenture Holders of John Welsted and Co.* v. *Swansea* ([1889], 5 T. L. R. 332), where the reporter's note states that there was raised an interesting question as to the registration of debentures under the Bills of Sale Acts 1878 and 1882 (41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43), Baron Pollock said: that though the matter appeared complex, he thought these debentures did not come within sect. 17 of the Act of 1882, for this simple reason, that they had existed long before the Acts, and yet had not been expressly named in them; and no one dreamt that a lawyer's ingenuity would class them with bills of sale. His brothers Chitty and North seemed to share that view, while his brother Grove apparently dissented. He thought to hold otherwise would be to sin against

the spirit and words of the Act" (5 T. L. R., at pp. 332–3). The decision in this case was to the effect that the plaintiffs, who had had debentures issued to them before certain creditors had issued execution, were entitled to their money, although they had not registered their debentures under the Bills of Sale Acts 1878 and 1882. In *Topham* v. *Greenside Glazed Firebrick Co.* ([1888], 37 Ch. D., at p. 290), North, J., said, "I will first deal with the contention that this memorandum is a debenture, "and is therefore excepted from the Bills of Sale Acts; that depends upon sect. 17 of the Act of 1882." The Bills of Sale Act 1882, s. 17, runs—"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels and effects of such a company." A covering deed executed by way of security for money lent to a company requires registration under the Bills of Sale Act 1878, s. 8—and, not being a debenture, does not fall under the exception of the Bills of Sale Act 1882, s. 17 (*Ross* v. *Army and Navy Hotel Co.* [1887], 34 Ch. D. 43; 35 W. R. 40; 55 L. T. Rep. 476). But in that case, Kay, J., spoke of debentures being excepted from the operation of the Bills of Sale Act. The aptness and precision of the analogy between the effect and consequences of the registration of a charge, whether of a bill of sale under the Bills of Sale Act 1878, s. 8, or of a debenture under the Companies Act, 1900, ss. 14, 15, is more apparent and obvious, *semble*, than that of the propriety of registering a debenture under the Bills of Sale Acts 1878 and 1882, could have been before the passing of the Companies Act 1900, ss. 14, 15. Eady, J., considered that the principle of two cases decided under the Bills of Sale Act 1878, s. 14, "extends in my judgment to cases in which the rights of third persons have actually accrued, and which would be prejudicially affected if registration were allowed without saving and protecting

these rights. In *In re S. Abraham and Sons, Ltd.*, 86 L. T. Rep. 290, where the facts were not distinguishable in principle from *In re Spiral Globe*, Buckley, J., refused to make an Order in the form of the Order in *In re Joplin Brewery Co., Ltd.*, after a voluntary winding up, saying, "I cannot see how the Order can do anybody any good." In this case the omission to register was due to sufficient cause within the Companies Act 1900, s. 15. It would appear, therefore, *that there is uncertainty on two points arising under the* Companies Act 1900, s. 15. (a) Whether the Order made by the Court, where there has been an excusable omission to register, will contain words saving the rights of creditors generally or only of execution creditors; (b) whether the Court will grant any order for extension of time after a voluntary winding up, even when the omission is due to some excusable cause, as defined under the Companies Act 1900, s. 15.

The decision in *In re the Spiral Globe, Ltd. (No. 2), Watson* v. *Spiral Globe, Ltd.* [1902], 2 Ch. 209, to the effect that, where the company passed resolutions to create a series of debentures, and actually issued some of the series before the Companies Act 1900 came into operation, and the remainder after that date, it was not necessary to register the last under the Act, is clearly over-ruled by the decision the Court of Appeal gave a few days after the former in *In re J. C. Johnson and Co.* (86 L. T. Rep. 791; [1902], 2 Ch. 101), where, under precisely similar circumstances, the applicant was allowed an extension of time under the Companies Act 1900, s. 15. *In re Spiral Globe (No. 2)* was, however, not noticed in the Court of Appeal in *In re J. C. Johnson and Co.* (3) The date from which the period of twenty-one days, limited by the Companies Act 1900, s. 14, subs. 1, runs, is the date at which a charge is created in favour of a person, "either named in the debenture or who can be named because he is the

bearer of the debenture, and who becomes entitled to the charge" (*per* Buckley, J., in *In re Harrogate Estates, Ltd.*, 19 T. L. R., p. 246). "The passing of the resolution to issue debentures only puts the company in a position to create a mortgage or charge when the debentures are issued" (*per* Buckley, J., in *In re S. Abrahams & Sons, Ltd.*, 86 L. T. Rep., at p. 291). "The resolution, of course, creates no charge. It is but the determination of the company that it will hereafter create a charge" (*per* Buckley, J., in *In re Harrogate Estates, Ltd.*, 19 T. L. R., p. 246). The question is whether the twenty-one days mentioned in sect. 14, subsect. 1, have run from the date of the issue of the debentures, when the instrument or particulars are sent in for registration. Debentures are said to be issued when "money is paid to the Company and an instrument under the Company's Seal is handed to the subscriber" (*per* Buckley, J. (*ibid.*, *supra*). (4) Even in the case of a series of debentures under sect. 14, sub-sect. 4, the period of twenty-one days does not run from the date of the resolution or the covering deed. The date continues "to be really governed by sect. 14, sub-sect. 1," and, therefore, runs from the issue of the first debenture of the series. Such a registration protects all debentures of the same series subsequently issued, and all debentures of the same series issued not more than twenty-one days before registration. The registrar ought to register under sect. 14, sub-sect. 4, at any time, irrespective of the date of the resolution or of the covering deed (*In re Harrogate Estates, Ltd.*). (5) Where a Company has passed resolutions to issue a serial issue of debentures, and has actually issued a portion of the series before 1st January 1901, the date at which the Companies Act 1900 came into operation, it is still necessary to register any other debentures of the series that are issued after that date (*In re Spiral Globe* (No. 1), *supra*, and *In re J. C. Johnson and Co.*, *supra*). (6) The following are instances

of omission to register through "inadvertence, accident, or other sufficient cause," which, by the Companies Act 1900, s. 15, are made the grounds of the Court granting an extension of time: (i) *In re J. C. Johnson and Co., Ltd.*, 86 L. T. Rep. 791; (ii) *In re Spiral Globe, Ltd.* (No. 1), 85 L. T. Rep. 779—a case of an omission to register "due to inadvertence," which was not discovered till six months afterwards; (iii) *In re S. Abrahams and Sons, Ltd.*, 86 L. T. Rep. 290. In this case Buckley, J., considered the omission to register within the twenty-one days, though "deliberate," was due to "some sufficient cause," when the solicitors consulted by the applicant advised him that, as the resolution was passed before the commencement of the Act, nothing required to be registered under the Act; (iv) *In re Harrogate Estates, Ltd.*, 19 T. L. R., p. 246, decided that, in cases under sect. 14, sub-sect. 4, when only the date of the resolution is wrongly given among the particulars required by that provision, it could be regarded as an omission to register "due to inadvertence" within the meaning of the Companies Act 1900, s. 15.

N. W. SIBLEY.

VII.—CIVIL JUDICIAL STATISTICS, 1901.[1]

THESE Annual Tables, which give the statistics of the Civil Courts, deal with all the civil business of the Courts, including that portion of the magistrates' work, which, whatever its form, is really civil. They are edited by Master Macdonell, with his usual care and skill, and to his excellent introduction we are indebted for most of the points to which we propose to call attention.

[1] *Judicial Statistics, England and Wales*, 1901. Part II.—Civil Judicial Statistics. London: Eyre and Spottiswoode.

Beginning with the highest Courts, there is an increase in the number of proceedings begun in all the Appellate Courts—except the House of Lords—accompanied by a decrease in the number of matters heard and determined. This last is also lower than the annual average 1897—1901, although the number of proceedings begun is in every case higher than that average to the extent of about one-third and a-half in the Judicial Committee and the Court of Appeal respectively. Two facts are particularly noteworthy in the returns for the House of Lords—(1) that there is an almost continued increase in the appeals from Ireland; (2) the increasing per-centage of reversals of the Courts below. This last has risen from 26·87 in 1900 to 38·30 in 1901. It is, however, fair to add that in 1896 the per-centage was even higher, being 38·39. The per-centage of reversals by the Judicial Committee has also, on the whole, risen.

The tables as to costs of appeals to the Judicial Committee and the House of Lords show that in the former the average of bills is £280 brought in and £224 (exactly the same as the last year) allowed; in the latter £505 brought in and £338 allowed. A comparison between the two shows that in the House of Lords the costs allowed average about fifty per cent. higher than those in the Judicial Committee, and also that a considerably larger amount is disallowed. We should like to direct attention to the paragraph in which Master Macdonell considers the business of the Judicial Committee.

As regards the very important subject of the "law's delay," attention is called to the fact that at the commencement of 1902 there were 440 appeals to the Court of Appeal pending, as against 140 at the commencement of 1897. It is not, however, quite so bad now owing to the occasional sittings of a third Court of Appeal, and it may be some satisfaction to be able to deduce from the elaborate

table compiled by Mr. Sudbury of the duration of the proceedings during 1901, "that the parties themselves or their advisers are responsible for no small part of the delay." It is worth noting the large proportion of motions for new *trial, or to enter judgment,* which were successful on appeal *from the King's Bench Division, nearly half, or 44 against 47* being allowed.

After a careful examination of the business of the Chancery Division from 1877 to 1901 the learned Editor has come to the conclusion that, even allowing for the withdrawal of the Companies Winding Up, "the business of the Chancery Division is almost stationary, with a tendency to decline, and that it does not increase at a rate corresponding to the growth of wealth or population." It is, however, satisfactory to the law reformer to hear that these results are, in Master Macdonell's opinion, chiefly the consequences of improvements in proceedings.

In the statistics of the King's Bench Division there is not much to remark. The number of writs issued is slightly larger than in 1900, but both as to actions entered for trial and actions tried there is a slight diminution. The only curious feature is a large increase in Judges' summonses, which is attributed mainly to applications in connection with injunctions at the instance of the Welsbach Incandescent Company.

Circuit business continues slowly to decline, but there are no very marked features to comment on.

We are now able to turn to a more cheerful aspect of the statistics and call attention to some Courts in which business has increased. In the Admiralty Division there was in 1901 a decided increase over the figures for 1900, though the increase is not completely maintained in the figures for 1902 which are given, the figures for the last three years being: 1900, writs issued 434, actions disposed of 199; 1901, writs issued 468, actions disposed of 315; 1902, writs issued 384, actions disposed of 263.

A record has been established in the number of petitions for dissolution of marriage, the number presented in 1901 being no less than 750, showing an increase of nearly 150 on the year before and 67 more than the previous highest, namely, 683 in 1897; but the proportion to the population *is exactly the same in the two years last compared*, being 1·87 per 100,000 in 1897 to 1·84 in 1901. In the six years 1897—1901 the petitions for judicial separation have remained almost absolutely stationary, and their average to that of petitions for dissolution has steadily diminished. It must, however, be brought into consideration as supplementing and perhaps partially accounting for the infrequency of applications for this remedy in the Superior Courts since 1897, that from 1897—1901 there has been an average of 6,404 separation orders granted per annum by Courts of Summary Jurisdiction. No less than 7,330 of these orders were granted in 1901, being an increase of nearly 700 on 1900. As Master Macdonell remarks, this number is likely to be further increased by the new Licensing Act. There are some interesting tables on this subject: one shows that the number of separation orders granted has risen per 100,000 of population from 2·77 in 1893 to 22·47 in 1902. It is difficult to draw any conclusion as to the diversity in the number of separation orders in various counties and boroughs, for though we should expect the per-centage high where the population is dense, and find it as to counties 40 in Lancashire and 48 in Durham, yet why should it be only 26 for Yorkshire and 18 London? or to take boroughs, what are the causes that make it 98 in Blackburn and Bolton, and 38 in Liverpool, and 29 in Sheffield? In the curious table of duration of marriage in cases of divorce it is impossible to explain the great rise in per-centage of petitions in the period of five years and less than ten, and again in that of sixteen years and less than twenty. One would have imagined that as a rule couples who could not

live happily together would have found it out before five years of married life, and certainly before ten.

There is much else of interest to which we might call attention, but we propose to conclude with a reference to the County Courts wherein the work continually increases, and in which in 1901 was transacted the largest amount of business since the Courts were established. The total number of plaints entered was 1,228,710 for the amount of £3,677,136, being an increase in numbers of 47,802 and in amount of over £90,060. The amount of judgments given has increased by about 50,000 for about £70,000. It is interesting in connection with the proposed increase in County Court jurisdiction to notice that the plaints for above £50 by consent have increased substantially. Other points to which attention is called by the Editor, and which deserve careful consideration, are the small and decreasing use made of juries, only about one case in 782 being so tried; the success of plaintiffs, only one judgment in 80 being for defendant, though of course this does not fairly represent the gain to a defendant from cutting down a case which must often happen; and the increase in proportion of judgment summonses issued and debtors actually imprisoned. There is a comparison between the business of County Courts and Circuits very much to the disadvantage of the latter, which seem to be getting much the worse of the competition.

VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

The Anglo-French Arbitration Treaty.

THE announcement of the signature on October 14th of a Treaty for five years between Great Britain and France for the automatic reference to the Hague Tribunal

of "differences of a juridical character or relating to the interpretations of existing treaties between them which may arise and are found incapable of solution by diplomacy, and which do not involve the vital interests or the independence *or honour of the contracting parties,* nor affect the interests of a third party," is welcome to all international lawyers and the philanthropic societies and individuals who have constantly urged the recognition of the Hague Tribunal as the proper universal forum for all international disputes which go to arbitration of the nations parties to the Hague Convention. The official statement by our Foreign Office that the Treaty is the outcome of a movement which has recently received considerable support in both countries, in favour of affirming the general principle of recourse to arbitration whenever that method can be safely and conveniently adopted, is a suitable recognition of the labours of those who have worked hard and persistently for this result, notably Dr. Thomas Barclay, who originated the idea of a general treaty of arbitration between them, and has pressed it steadily on official, legal, and commercial classes on both sides of the Channel. (See this Magazine, Vol. XXVII, 467.) There is a striking difference between the present Treaty and the Anglo-American one of 1897, both in scope and in method. Based directly upon Article 19 of the Hague Convention, the Treaty confines itself to the field of specified classes of differences which admit of determination by legal methods, the interpretation of treaties, and the application of general rules of International law as to rights and obligations, while leaving to diplomacy all questions in which policy must govern, *e.g.* (unless the Treaty is construed as referring only to future and not existing causes of disagreement), the extent of the French rights in the Newfoundland fisheries can go to the Hague Court, whereas the New Hebrides question may be left to diplomacy. In method the Treaty abandons the lines of the strictly domestic tribunal, com-

posed of representatives of the two countries, in favour of the Hague Tribunal. It is to be hoped that the Treaty from its limited nature will not encounter any difficulties of ratification which experience has shown are incident to treaties of general unrestricted application (see this Magazine, Vol. XXVII, 459); though the Chili-Argentine Treaty of 1902 for reference to the arbitration of a third party (Great Britain if friendly) of all differences, with the only exception of those affecting the constitutions of both countries, seems likely to be satisfactory in practice (*Revue du Droit Int. Public*, 1903, 547): and the Treaty should be the first of a series for this object between all the signatories of the Hague Convention, which will make the Hague Tribunal a regular part of the international machinery of the world.

Great Britain and the Hague Marriage Law Convention, 1902.

The Conference of the International Law Association at Antwerp this year, though it chiefly concerned itself with the consideration of subjects of comparative legislation, has called attention to one serious defect in the juristic relations of our country to others, namely, the abstention of Great Britain from the legal Conferences at the Hague on Private International law, the disadvantages of which were propounded to the Conference in a paper by Sir Walter Phillimore. A strong opinion in favour of the importance of Great Britain no longer standing aloof from the general European movement in this direction, and thus losing the opportunity of stating her views on the various branches of family law so dealt with, was expressed by English and Scotch lawyers, shipowners, and other representatives of commercial interests; and a paper by M. de Leval of the Brussels Bar showed how one of the Conventions thus framed and about to come into force by legislative sanction

in each country signatory of it, namely, that for the solution of conflicts in the law of marriage, was capable of adoption by Great Britain. The object of this (as of the other previous Conventions) is not to impose an uniform code of law on the various nations and so interfere with their domestic law, but rather to supply rules for the recognition of foreign marriages and divorces so far as is consistent therewith. The Convention, while expressing a preference for the national law of the parties as determining their right to contract marriage, allows equally the law referred to by their national law to govern, *e.g.*, in England the law of the domicil or the law of the place of celebration: and it does not oblige any State to allow foreign persons to marry within its jurisdiction who could not do so if they were its subjects, *e.g.*, within prohibited degrees of relationship such as with a deceased wife's sister. The form of marriage is to be governed by the *lex loci celebrationis*, but the national law may consider that the marriage is invalid for not satisfying its own religious formalities or its conditions of previous publications to parents (as in France), and for that country only such marriage will be void. Conversely, if a marriage is not valid as regards form according to the *lex loci*, it may be regarded as valid in other countries if the form required by the national law has been observed. Consular marriages for persons not subjects of the State where they are celebrated are recognised as valid everywhere, and if allowed in the country where they are celebrated cannot be objected to there for being contrary to the municipal law by reason of anterior marriage or religious obstacles. The United States, no less than ourselves, except that in a federal body of equal States the necessary legislation is more difficult to obtain, might well associate themselves with this movement towards unification of international family law; and it has been authoritatively pointed out (Judge Baldwin of Connecticut, *Yale*

Review) that this subject is receiving increasing attention there from the Legal Department of the Federal Government.

Foreign Judgments.

The discussion at the Conference on the Execution of Foreign Judgments took the practical course of considering a draft treaty for this purpose capable of adoption between Great Britain and Belgium, a State which already possesses a similar treaty with France, and M. Lachau of the Paris Bar, to whom this latter treaty owes its inception, spoke of the prospect of another such treaty being made between France and Germany. Belgian lawyers pointed out that among the difficulties to be overcome in this respect are (1) the condition imposed by the Belgian Constitution that a judgment to be enforceable must be in a reasoned form, *motivé*, a condition which the records of English judgments have been held by the Belgian Courts not to comply with; (2) the English doctrine of jurisdiction being founded by actual presence of the defendant within the jurisdictional limits of the Court whose process is served on him; and (3) the binding effect assigned by Belgian law to proceedings before notaries. English lawyers showed that in England the Judges could frame a rule of procedure for granting certificates of judgments which it was desired to execute abroad in a form *motivé;* that as regards (2) if the Belgian Courts did not recognise it no question could arise on it in England; and that as regards (3) this was a question of evidence which the Courts could decide inherently, and that thus no legislation would be necessary. The vexed question of the effect of a defence to proceedings for execution being taken here that the foreign judgment was obtained against the defendant by subornation of perjury by the plaintiff, would not probably require specific mention in any such treaty, but could be left to the Courts of each country to

consider, though it is to be hoped that our present decisions upholding its validity will be reconsidered by a higher Court. The discussion showed a decided opinion that such a treaty is only possible between States which can trust each other's Courts, and in such a case the broad simple lines of the Franco-Belgian treaty might well be followed.

General Average.

Three other subjects—the law of General Average, Companies, and Shipowners' Liability for Collision—were treated by the Conference rather from the point of view of comparative legislation. In general average the questions for consideration were, whether where the necessity for the voluntary sacrifice has been caused by fault of the master or crew for which the shipowner is responsible (1) the shipowner can claim contribution in general average, (2) or whether the innocent owner of cargo can do so, and (3) whether it makes any difference that the shipowner is protected as between himself and the goods owner by a clause in the contract of shipment exempting him from liability in such a case. English law (and foreign law) answers the first question in the negative and the second in the affirmative, and on the third point (in practice the commonest) there is a conflict between the various judicatures. Our Courts hold that such a clause has the effect of allowing the shipowner to claim in general average. The United States Supreme Court, on the other hand, has held by a majority in the contrary sense where the shipowner has this exemption by statute (the Harter Act), and this reasoning would seem to extend to a case of similar exemption under contract. It seems that by the law of Holland in such a case the shipowner cannot claim, though he can by that of France. The Belgian Courts have differed in opinion, the Appeal Court of Ghent (confirmed on the facts

by the Cour de Cassation) holding that the shipowner cannot under such a negligence clause claim contribution from other parties though he can defend himself by it against the shipper; *while the Brussels Appeal Court* has come to an opposite conclusion. The Conference, after considerable discussion which showed a pretty equal division of opinion, adopted resolutions declaring (A) that, independently of contract, a general average act should entitle the shipowner to contribution, even though necessitated by the fault of his servants, the other parties retaining their rights against him under their contracts; (B) that, under a general negligence clause in the contract of affreightment, the position should be the same; (C) that it was not desirable to insert a rule to this effect in the York-Antwerp Rules.

The effect of this last decision was, however, discounted by the carrying of a Rule, capable of adoption in shipping contracts, providing that "rights to contribution in general average shall not be affected though the danger which gave rise to the sacrifice or expenditure may have been due to default of one of the parties to the adventure, but this shall not prejudice any remedies which may be had against that party for such default." This Rule, which was drafted and proposed by Mr. Carver, K.C., would have the merit of putting the law in this matter on the logical basis that the "law of general average is one thing and the law of affreightment another, and that it should be immaterial which interest is sacrificed for the common good." This is especially necessary when it is remembered that there may be many owners of cargo shipped in the same bottom under varying contracts, some with a negligence clause and others without. The rights of the cargo owners *inter se* cannot be affected by their individual contracts with the shipowner, nor

can their rights against the shipowner be affected by their co-shippers' contracts with him: although in practice the fact that each bill of lading incorporates York-Antwerp Rules is treated as creating a relation on that footing between the *bill of lading holders.* Equally from the point of view of marine insurance, it would seem to be an advantage to the underwriter standing in the shoes of his assured to pay or receive contributions without having to consider the effect of any contract except that by which he undertakes to indemnify his assured.

On the practical side of the same subject of General Average, attention was called by Mr. Elmslie (Average Adjuster of London) to the following points in the working of the York-Antwerp Rules. There has been a tendency, as yet confined to certain shipping trades, to incorporate in contracts of affreightment the York-Antwerp Rules, not in their entirety, but with certain Rules excepted, *e.g.* in the timber trade to excise the Rule not to contribute for jettison of deck cargo, and the stipulation in marine policies is "to pay according to York-Antwerp Rules if in accordance with the contract of affreightment." There are also differences between the English and Continental practices in estimating the amount to be made good for sacrifices in general average, and in estimating the values of the contributory interests: salvage is treated as general average in Denmark, while with us it is treated as a special charge apportioned on the values of the different interests as proved to the Court awarding salvage: and on points such as whether the gross or net freight of goods jettisoned should be the measure of indemnity, what is a "peril" which justifies a general average sacrifice, what portion of docking expenses can be assigned to general average, and what point of time can be taken as the termination of the adventure, an

exchange of views between average adjusters and lawyers of the different countries might be able to remove many needless divergencies.

Law of Shipowners' Liability.

An interesting point of conflict of laws in the matter of shipowners' liability, raised by a recent decision of the Court of Appeal at Rouen, was brought before the Conference by M. Georges Marais of the Paris Bar, namely, the law applicable in a French Court for determining the extent of the responsibility of a foreign shipowner for a collision in French waters. A collision took place in the port of Havre between two English ships one of which carried a cargo of coal belonging to a French company. This ship brought an action in England against the other, which admitted her liability for the collision and paid the amount of her statutory liability fund into Court, but the owner of the coal declined to accept the dividend due to him out of this fund and brought an action at Rouen for full compensation. The Rouen Court held that the provision of the French Civil Code and not the English law determined the extent of the shipowners' liability for the consequences of a collision happening in French waters, and it rejected the contention that the extent of liability of the shipowner for the fault of his captain should be governed by the law of the flag on the ground that the relation of owner and captain was a question of "mandate" or agency falling exclusively within that law.

French Courts have previously held, in the case of collision on the high seas, that the owner of a negligent English ship cannot set up the defence allowed by French law of abandoning his ship and thus freeing himself from liability (Cour de Cassation): but that in the case of a collision in French waters under similar circumstances a guilty English ship can take advantage of this privilege,

and is not bound to pay damages in any event under the English law, on the ground that the French law, as that of the *locus delicti*, must prevail.

By our law, as is well known, in territorial waters the territorial law decides the question of the shipowner's liability for collision, and on the high seas the general Maritime law as interpreted by English Courts; but the extent of the liability is determined by our *lex fori*, the Merchant Shipping Act, for foreigners and nationals alike wherever the collision took place: and we do not apply the law of the flag for delicts though we do so in the contractual relations of the parties to the ships' adventure. Belgium and Germany similarly apply the local law of the place of collision, but for a collision on the high seas between ships of the same nationality the highest German tribunal has applied the law of the flag, and at a Congress of Commercial law, held at Antwerp in 1885, a resolution was adopted that this law should be the standard. In delicts, however, it is difficult to see what standard would do greater justice, because the same for all cases, than the territorial law and its consequential *lex fori*, for determining the extent of the liability imposed by the *lex loci*?

Company Law.

The time at the disposal of the Conference did not permit of any examination or criticism of an abundance of materials, presented on the various municipal systems of Company law in force in Belgium, France, Germany, Italy, and Great Britain, with regard to the following suggestions: (A) Whether there should be imposed on promoters the duty of disclosing all contracts made (1) between themselves, (2) with third parties previously to and in contemplation

of the incorporation of the Company: (B) Whether the Government should verify the existence and value of the assets other than cash *(apports)* contributed by members to the capital of the Company: (C) Whether a company should be forbidden to make an issue to the public before it has been in existence for a stated time or before it has fulfilled certain conditions, and if so upon what conditions: (D) Whether any extension of personal liability of directors and officers of a company is desirable.

The fundamental difference between English law and the systems of the Continent generally seems to be that with us the company is first constituted by the memorandum of association and registration, and it then invites subscription from the public for its shares by issuing a prospectus: with them, generally speaking, as the capital must be found before the company can be constituted, the capital is first provided by financial houses who take the whole of the shares and the company is then formed, and is incorporated by registration as soon as 25 per cent. of the share capital has been paid up in cash. With us the company, though incorporated, cannot begin business till it has received an enabling certificate from the Registrar, and it cannot allot shares to the public till certain conditions have been complied with, *i.e.*, subscription of the whole of the amount offered or authorized to be offered by the memorandum or articles of association or prospectus, and payment of 5 per cent. thereof to the company on application, an amount which the London Stock Exchange requires to be increased to 10 per cent., and two-thirds of the shares issued to be offered to the public before allowing quotation. Our law also imposes on promoters and directors the duty of making full disclosure of the material circumstances affecting the prospects of the company, such as contracts and valuations,

and they are responsible for the accuracy of statements in the prospectus addressed to the public; and the only direction in which an extension of such responsibility was suggested by the Conference was, that directors shall be liable for the accuracy of the reports of experts cited in the prospectus.

The German law differs materially from our own in many respects; *e.g.*, having local registration instead of central: and, while ostensibly more stringent in its requirements, it does not seem to offer so much protection to the investing public. There is no responsibility of promoters or directors to any-one except to the company: the term "promoters" applies only to shareholders: the officers of the company as such are not responsible for the contents of any prospectus inviting the public to take shares, the company itself not offering its own shares, as it does not come into existence till the whole of the capital is placed; and the persons issuing the prospectus are liable to the company only, and not to the individual shareholders, for a period only of two years from incorporation for neglect to apply the care of a diligent business man, but in the case of shares negotiated or quoted on any German Stock Exchange, they are liable to the shareholders during a period of five years. The duty of disclosure of contracts &c. by promoters does not extend to intermediaries and nominees of theirs: there is no power, as in England, in winding-up proceedings for the Court to inquire into the conduct of persons interested in the foundation of the company, and compel them to refund or compensate in case of their misconduct; and proceedings against directors for fraud &c. must be at the expense of the shareholders taking action. Other legislatures, such as the French, Italian, Belgian, and others, have already attempted to grapple specifically with the difficulty of ensuring the value of *apports* being what it is represented to be, by

restricting the sale of shares which are allotted as an equivalent for them &c., and suggestions were made at the Conference for dealing farther with this point, and also with that of promoters' profits. The foreign lawyers agreed in condemning the system of official valuation of *apports* as a quite ineffective safeguard, and in approving of the English system of publication of the antecedents of companies and responsibility of directors and promoters. In the case of issues to the public this seems to give as good results as can be expected; but it was pointed out that the present tendency in England in forming companies is not to resort to the public in the first place—the Board of Trade returns for 1901 showed that five-sixths of the companies registered in that year did not apply to the public for subscription—and if so, the prospectus with its consequent responsibilities is avoided. There is at all events abundant scope for treatment of this subject from the point of view of comparative legislation.

G. G. PHILLIMORE.

IX.—NOTES ON RECENT CASES.

SCOTCH CASES.

THE evil results of careless parliamentary drafting are seen in an aggravated form in the case of statutes which may or may not be intended to apply to Scotland, but which in language, procedure, and references are entirely alien to Scottish legal institutions and practice. Where the Scottish Courts have had the interpretation of such statutes under consideration, their judgments are too often inconsistent and contradictory, but a still greater public inconvenience arises where there has been no opportunity of obtaining an authoritative judgment from the Court of Session, and

questions of daily practice are thus left to the unaided discretion of puzzled officials and legal practitioners. On these grounds we hail with a measure of satisfaction a judgment of the Second Division, *Levy* v. *Jackson* ([16th July, 1903], 40 Sc. L. Rep. 832), which settles, so far as the Scottish Courts are concerned, the perplexing question whether the Gaming Act 1845 applies to Scotland. The answer is now in the negative, but it is a serious reflection upon the work of our legislators that, for more than half a century, no legal adviser could with any confidence deny to the Act a place among Scottish statutes. The application to Scotland of the Act had been previously under the consideration of the Court of Session in *Foulds* v. *Thomson* ([1857], 19 D. 803), where the Act was assumed to apply to Scotland, and the judgment proceeded expressly on that footing. (See particularly Lord Wood, 19 D., at p. 815). In the Sheriff Court, the late Sheriff Berry decided that the Act applied to Scotland (*M'Sorley* v. *Muirhead* [1897], 5 Sc. L. T. Rep. 7). On the other hand, doubts as to its application were expressed by the Court of Session in *O'Connell* v. *Russell* ([1864], 3 M. 89), and *Calder* v. *Stevens* ([1871], 9 M. 1074), while in the Outer House, Lord Stormonth Darling held, in *Russell* v. *Grey* ([1894], 1 Sc. L. T. Rep. 529), that the Act did not apply.

But the Gaming Act is not the only one in regard to which the Scottish public is placed in a position of extreme difficulty. There are other Acts of even greater importance, the application of which is quite uncertain, and to illustrate the state of chaos in which the whole matter rests we shall take two of these Acts and endeavour to show how each is presently regarded by the judicature and by the profession. We shall take first the Borough Funds Act 1872, in regard to which the whole trend of judicial opinion has been in favour of its application to Scotland. The question was raised in *Perth Water Commissioners* v. *M'Donald*

([1879], 6 Ret. 1050), and, though not necessary to the judgment, clear opinions were expressed that the Act applied to Great Britain. The Lord Justice-Clerk (Moncreiff), in expressing the opinion that the Act applied to Scotland, said: "There are no words excluding Scotland from its provisions. Ireland is specially excluded, and the statute deals with interests which are the same on either side of the border. The only reason for supposing that it was not meant to extend to Scotland is that it is drawn with such exclusive reference to English legislation and English institutions and procedure that, although it would be easy enough to find equivalents in our own usages for these English requisites, it would be difficult, if not impossible, to follow out in Scotland the precise injunctions of the Act. It is not the part of the judge to criticise the Acts of the Legislature; but I do not think I transgress due limits if I say that it is unfortunate that our public bodies and our Courts of law should be put to solve such questions as these, when a little ordinary care and inquiry on the part of those by whom such English Acts are framed would prevent them from arising." All the other judges expressed similar opinions. Again, in *Leith Dock Commissioners* v. *Leith Magistrates* ([1897], 25 Ret. 126), the Lord Ordinary adopted the reasoning of the judges in the case above referred to, and founded particularly on the fact that Ireland was expressly excluded from the operation of the Act, while Scotland was not mentioned. On appeal, the Second Division gave judgment on other grounds; but the Lord Justice-Clerk (Macdonald) gave emphatic approval to the Lord Ordinary's views on this branch of the case. So far, therefore, as authority goes, it seems altogether in favour of the application to Scotland of the Borough Funds Act 1872.

The other Act which may be referred to in this connection is the "Preferential Payments in Bankruptcy Act 1888." In a large number of Sheriff-Court cases the Act has been

held to apply to Scotland, and, as bankruptcy in Scotland is administered by the Sheriff Court, it may be taken that *de facto* the Act is in daily operation, and that its provisions determine innumerable cases of preferential claims of small amount. The question has not in any case been brought by appeal before the Court of Session, and, as Sheriff-Court decisions do not form precedents, we have as yet no authoritative guide. But we have no lack of contradictory opinions, and we shall take an example from each side. In one of the earliest of the Sheriff-Court decisions already referred to (*Crawford's Cessio*, 1889, 6 Shf. Ct. Rep. 11) Sheriff Balfour said—"The leading provision with reference to the scope of the Act is contained in the fourth section which provides that the Act shall not apply to Ireland. The undoubted effect of this is to make the Act apply to England and Scotland." The Sheriff then points out that, so far as Joint-Stock Companies are concerned, there can be no question that its provisions apply to Scotland, and he therefore concludes—"(1) Where one is dealing with a statute which on the face of it applies to Scotland, it would be unreasonable to hold that one part of it applies to Scotland and another does not; (2) although an ambiguous and inapt term is used in the statute, that does not render the statute inoperative in Scotland, but it lays the burden on those who have to administer the Act to determine what interpretation is to be put upon the expression in Scotland." On the other hand, Professor Goudy has the following in a foot-note to the second edition of his excellent work on Bankruptcy—"Owing to a clause in this Act (50 & 51 Vict. c. 62) which declares that it shall not apply to Ireland, without mentioning Scotland, some doubt, it is understood, has been felt as to whether it does not apply to Scotland. But there is no substantial ground for this doubt. The intention of the statute as regards its bankruptcy provisions was to restore with some variation the rules regarding preferences for

wages contained in the earlier English Bankruptcy Act of 1849. It accordingly repeals in express terms part of sect. 40 of the English Bankruptcy Act 1883. Further, the language of this Act of 1888 is in great part without meaning as regards Scotch bankruptcy proceedings, and it could not be applied in practice" (p. 542). From this we gather that Professor Goudy and his able editors are of opinion that the portion of the Preferential Payments in Bankruptcy Act 1888 applicable to ordinary bankruptcies, does not apply to Scotland, but the argument that that portion cannot be applied in practice clearly fails, because, as already pointed out, the decisions of the Sheriff Courts which administer the Scottish Bankruptcy Acts are almost entirely in favour of the application of the whole Act to Scotland, and it is, consequently, daily applied in practice.

Had space permitted, we might have shown by judgments of the House of Lords that the tendency of the Supreme Court of Appeal has been to uphold the application to Scotland of Acts such as those above referred to, and that the recent case of *Levy* v. *Jackson (ubi sup.)*, which has been the occasion of this note, would probably be reversed if it were submitted to that tribunal. We may point particularly to *Commissioners of Income Tax* v. *Pemsel* ([1891], A. C. 531), where the House went out of its way to condemn the Scottish case, *Baird's Trustees* v. *Lord Advocate* ([1888], 15 Ret. 682), in which arguments similar to those used in *Levy* v. *Jackson* had been pleaded and sustained. While this is so, we cannot absolve the draftsmen of the Acts in question from the responsibility of having caused all this uncertainty and litigation, by not making the meaning perfectly plain, and, where necessary, adapting the phraseology to Scottish requirements.

R. B.

IRISH CASES.

The maxim that "the Crown passes toll-free" would at first glance seem to be a relic of prerogative without much important bearing on the course of modern life. But when we reflect that the Crown means, for present-day purposes, the servants of the Crown, and that therefore the privilege in question comes to be enjoyed by policemen and postmen on duty, the matter becomes more practical. As a result then of the prerogative, confirmed by the Post Office Acts, postmen and telegraph messengers on duty are entitled to pass free over such few highways and public bridges as are still subject to tolls, and also over ferries properly so called. But the case of *Attorney-General* v. *Londonderry Bridge Commissioners* ([1903], 1 Ir. R. 389), illustrates an attempt on the part of the Post Office to stretch this immunity farther than it would bear. Over the Foyle there was at one time an ancient ferry. Many years ago, under various private Acts of Parliament which need not be particularly cited, authority was given to a body called the Derry Bridge Commissioners to substitute for this a bridge, and to charge tolls for its passage, with a statutory exemption from such tolls (which exemption was only declaratory of the prerogative) in the case of Crown servants and in particular of Post Office officials. Subsequently, in addition to the bridge, the Commissioners found it convenient to set up a steam ferry from one bank of the Foyle to the other: and for this also in 1877 they received statutory authority. The ferry, however, did not (as did the bridge) act as a continuation of a highway, but ran merely for the convenience of passengers from quay to quay. The Post Office, by the present action, claimed a right for their servants to be conveyed free across it. The Court (Porter, M.R.) held that no such right

existed. Undoubtedly the right would exist in respect of a ferry, *sensu stricto*. Such a ferry may be defined either as "a right of providing a highway over water, in consideration of tolls in the nature of turnpike tolls" (per FitzGibbon, L.J., in *Derry Bridge Commissioners* v. *M'Keever*, 27 L. R. Ir. 482), or, more accurately, as "an exclusive right to convey passengers across a river or an arm of the sea from one vill to another, or to connect a continuous line of road" (*Newton* v. *Cubitt*, 12 C. B., N. S., 32). This right is of course a franchise, a *jus regale* in the hands of a subject; and its exercise is subject to the corresponding obligation upon the holder of the right, of providing at all times a reasonable amount of ferry-service for the public—an obligation which could, if necessary, be enforced by indictment. But the steam ferry kept by the Commissioners was not such a ferry; it was a purely private enterprise, although carried on by a public body and under statutory authority, and could be discontinued at will without any liability to indictment; it did not connect highways, but landed its passengers on one side at private grounds, the property of a railway company, used only by permission. And not being a strict "common law" ferry, it was free from the prerogative right in question.

The deciding question as to whether a ferry is public or not would appear to be, whether the owner of the ferry is under a public duty to keep it running? And in the case of modern ferries, like that in the present case, established under statutory powers, this will usually resolve itself into a question of construction on a private Act of Parliament.

By this time, the Settled Land Acts have undergone judicial commentary in almost every line. But it would seem that the point in *Conolly* v. *Keating* ([1903), 1 Ir. R. 353), though small, is a new one. A testator settles real

estate on his daughters for life, with remainders over. Before his death, he advances sums of money to the husbands of two of these daughters. After his death, by a deed of family arrangement, all the real estate is conveyed to trustees to hold on the trusts of the will, charged, as to the life-estates of the above-mentioned two daughters, with the repayment to the trustees of the sums advanced to their husbands. Subsequently, an order is made for the administration of the testator's real and personal estate, and the real estate under this order is sold to a purchaser. Can all the tenants for life convey to this purchaser, under the Settled Land Acts, an interest discharged from the incumbrance created by the deed of family arrangement? The answer depends on the construction of sect. 20 (2) of the Settled Land Act 1882, which enacts (in substance) that a conveyance by the tenant for life passes the lands discharged from all the limitations of the settlement, and from all estates to arise thereunder, but subject (*inter alia*) to "all such other, if any, estates, interests and charges, as have been conveyed or created for securing money actually raised at the date of the deed." Were then the sums advanced to the husbands by the testator "money actually raised" within the meaning of this exception? The Court answered the question in the negative, holding that the words "actually raised" could only be taken literally, and that no money was raised at the date of the deed of assignment. It held, therefore, that the purchaser took an interest discharged from these incumbrances.

It is, perhaps, not altogether easy to reconcile this decision with a *dictum* of North, J., in *In Re Sebright's Estate* (33 Ch. D. 429), where his lordship expressed his opinion that the words of the section "include all estates and interests created subsequently to the settlement for the purpose of *securing* money, and that they, therefore, include a mortgage of his life-interest made by the tenant

for life for the purpose of securing money." This language would seem almost wide enough to include such a charge as that in the present case; but Mr. Justice North had not to consider the effect of the words "actually raised."

That troublesome term "malice" has caused confusion to most legal students at some time or other; and when a statute makes it an essential ingredient in an offence that an act shall be done "maliciously," the exact import of this may cause trouble even to those whose student days are long past. As a reading on the statutory meaning of "malice," the case of *M'Dowell* v. *Corporation of Dublin* ([1903], 2 Ir. R. 541), although primarily an interpretation of a purely Irish statute, is of some general interest. The Grand Jury Act (Ir.) 1836, as altered and extended by the Local Government (Ir.) Act 1898, sect. 5 (1), gives a right of compensation to the owner of property which has been *maliciously* injured, provided that such malicious injury is a crime under the Malicious Damage Act 1861. What is the meaning of "maliciously" here? In the present case, a thief, for the purpose of committing a larceny, broke a jeweller's plate-glass window and stole some goods: was the breaking of the window a malicious injury for which the jeweller could recover compensation from the Corporation or County Council of the City? There are two possible legal meanings of "malice":—(A) an act is said to be done maliciously if it is intentional and illegal, even though the actor had no spite or ill-will towards the person hurt by the act. Malice in this sense is the conscious violation of the law, to the prejudice of another (*per* Lord Campbell, in *Ferguson* v. *Kinnoull*, 9 Cl. & F. 321). Or (B) there are some exceptional cases in which the legal is also nearly the popular meaning of malice, and a malicious act is an act done out of spite against another. If the latter sense were that necessary to

make an injury "malicious" within the meaning of the sections now under consideration, the jeweller could not recover compensation: for the would-be thief did not break the glass out of any spite towards its owner, but with the dominant motive of committing the theft. In support of the argument that this latter sense was the true construction of the present section, there were cited the decisions under a somewhat analogous English statute, giving a right to compensation against the Hundred—the so-called Black Act of 9 Geo. 1, c. 22. That Act dealt with the maliciously killing cattle or destroying ornamental trees, and while giving the injured party a right to compensation from the Hundred, it imposed upon the criminal the penalty of death. And several decisions under the Black Act—which may be taken to correspond to the early Irish Whiteboy Acts—lay it down positively that the statute only applies where the act was done with actual malice, in the sense of spite, against the owner of the property: *e.g.*, *Curtis* v. *The Hundred of Godley*, 3 B. & C. 248. In the present case, however, the Court of Appeal had no difficulty in holding that this strict and indeed artificial construction of the Black Act was due to its being a criminal statute imposing the capital penalty, and was *in favorem vitæ*. They were equally clear that, taking the act of breaking the glass by itself, it was a misdemeanour under the Malicious Damage Act 1861, which could have been tried and punished separately even though accompanied by a felony. There was, in short, no reason why "maliciously" should not, in these sections of the Grand Jury Act and the Local Government Act, receive what is now its ordinary legal meaning—"a wrongful act done intentionally without lawful excuse." Any other meaning of malice, it is submitted, is at the present day exceptional.

It is perhaps just worth notice that this case has to be distinguished from *Reg.* v. *Pembliton* (L. R., 2 C. C. R. 119).

The distinction seems to lie in the fact that in the last-mentioned case the jury had found that the actual damage done (also the breaking a window) was not intended; while in the present case the breaking of the window was clearly an *intentional* act, although intended only as a step in a process, and although the dominant motive was to do another kind of harm.

Cases under the Workmen's Compensation Act, in Ireland as in England, continue to show that the obtaining compensation under that Act is more in the nature of a lottery than so important a matter should be. In *Fogarty* v. *Wallis* ([1903], 2 L. R. 522), the respondents Wallis & Co. were carriers, employed by the Post Office to assist in the carriage of parcels in Dublin during the heavy Christmas traffic. To cope with this traffic, the Post Office had taken temporarily from the dock authorities a transit-shed in the Custom House Docks for the storage of parcels. Wallis & Co. brought parcels from different parts of the city to this shed. Fogarty was a carter in their employment, and while so engaged was crushed by his cart against the wall of the shed. It was held that the site was a factory and that Wallis & Co. were undertakers. If the Post Office had hired a shed somewhere else than at a dock, apparently compensation could not have been recovered: and this is where the element of chance seems to have an undue importance. But "factory" under the Factory and Workshops Act 1895, sect. 23 (1), includes every dock, wharf, and quay: no reference is made to the mode of user of the dock: and *Kenny* v. *Harrison* ([1902], 2 K. B. 168), appears to show that a dock attracts the provisions of the Workmen's Compensation Act, for whatever purpose it is being used. Is there any hope of an amending Act, to simplify this tangle of artificial construction through which every interpreter of the Workmen's Compensation Act labours?

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

A History of English Law. By W. S. HOLDSWORTH, M.A., B.C.L. Vol. I. London: Methuen & Co. 1903.

The study of the history of English legal institutions is a sign of the times. We are no longer dependent on the unreadable and often inaccurate pages of Reeves. Mr. Holdsworth's work, though different in amount and scope from the two large volumes of Pollock and Maitland—it deals mainly with Courts and jurisdiction, not with substantive law—is the result of little less labour and reading. As compared with Dr. Carter's *History of English Legal Institutions*, recently reviewed in these columns, it is more detailed and contains more citations of original authorities, especially precedents of writs and documents in the Selden Society's publications. All who read this volume will look forward with interest to the promised second volume. Among matters which the skilled pen of the learned writer has dealt with in a conspicuously successful manner may be mentioned the history of the jury, the abuses in Chancery in and before Lord Eldon's time, and the distinctions between feudal and manorial Courts, the two Courts of Exchequer Chamber, and the Star Chamber and the Council. Most of the statements of fact appear to be correct, except that there are probably no Vice-Admiralty Courts now remaining, but only Colonial Courts of Admiralty and Courts with Vice-Admiralty jurisdiction. A few omissions suggest themselves, but they are very small, and can hardly affect the value of the book. There appears to be no notice of beaupleader, purchase of writ, feigned issue, and one or two other points of interest in old practice. Nor would the reader gather from Mr. Holdsworth's text on the subjects that the Chancellor of the Duchy of Lancaster still appoints magistrates in Lancashire, or that the Admiralty jurisdiction of the Liverpool Court of Passage is still vigorous, and likely to become more so with a new judge and new rules of procedure. The space given to the treatment of the Ecclesiastical Courts seems somewhat ample. The history is no doubt interesting, but they are of little practical importance at the present day. No student of English institutions can afford to neglect Mr. Holdsworth's book.

Fifteen Decisive Battles of the Law. By ERNEST A. JELF, M.A. London: Sweet & Maxwell. 1903.

This is a collection of short studies of fifteen leading cases ranging from *Ashby* v. *White* to *Allen* v. *Flood.* The title is of course adapted from Sir Edward Creasy's well-known work. These sketches were originally published in the *Law Times.* They are well selected, and written in a lively and attractive style, admirably suited to fix the attention of students. There are one or two slight errors, such as the statements that, in *Ashby* v. *White*, Mr. Justice Gould had given judgment for the *plaintiff*, and in *Allen* v. *Flood*, that *five* Law Lords were in favour of the appeal instead of *six*.

Coronation of King Edward VII. The Court of Claims. Cases and Evidence. By G. WOODS WOOLASTON, M.A., LL.M. London: Harrison & Sons.

To all interested in genealogy and ancient customs, and to all who may desire for any purpose to get up the subject of the Coronation claims, this volume will prove both a pleasure and an invaluable assistant. It gives all the claims made in connection with the Coronation, and divides them into five heads. The first and most important is "Claims as of right" on which judgment was delivered by the Court. The most important and interesting of these cases are those of the Barons of the Cinque Ports, the Great Spurs, and the Lord Great Chamberlain of England. This last, however, was not decided by the Court, but by the Committee for Privileges, and an epitome of it is given in the Appendix. The second head is "Cases argued before the Court, but on which no order was made." The third comprises "Cases in which no claim as of right was made." Perhaps the claim here which will meet with most general sympathy is that of the Westminster boys, and we are glad to think their request was granted. Head four is "Cases not argued before the Court, and no order made thereon." There are a number of interesting cases included under the last head of "Claims excluded from the consideration of the Court by the terms of the Proclamation." All the petitions are given in full, with an epitome of the arguments in those cases which were heard. The judgments are so short that not much is to be gained by a perusal of them, beyond the fact that such and such a claim was considered proved, or not; but there is a store of learning and suggestions to be found in the record of the proceedings, and much curious and valuable information is to be found in the Appendices.

Some London Institutions of Public Importance in their Legal Aspects. By ERNEST ARTHUR JELF, M.A. Edited by ALEXANDER COCKBURN MCBARNET. London: Horace Cox. 1903.

These essays, which have been reprinted from the *Law Times*, contain a happy idea, happily carried out. They deal with a number of very important institutions and personages, and give information about their legal history and position, which information must be interesting to all, and may be very useful to those who have for any purpose to consider the subject, and can only have been got together by great labour and research. They are written in a pleasant style, and are not over-weighted. We do not think they are arranged on any particular system, as they begin with the Corporation and end with the King. The Institutions treated of spread over a wide range, including great commercial institutions like the Bank of England and the Stock Exchange; Government Departments, as the Treasury, the Board of Trade, the War Office; associations of professional men like the Inns of Court, the Royal Academy, and the respective Institutes of Architects, Surveyors, and Accountants. Here we may call attention to Mr. Jelf s strongly-expressed opinion of the desirability of giving such bodies as the Royal Institute of British Architects, the Surveyors' Institute, and the Institute of Chartered Accountants, control over their respective professions. This is advocated for many reasons, but mainly to put a check on the prevalent and pernicious habit of "expert perjury." The legal position of the three great Water Companies dealt with will soon have mainly an historical interest, and probably for similar reasons the School Board is not dealt with at all. The only addition we would suggest is a short account of the proceedings taken by the Crown against the Corporation in the time of Charles the Second, which resulted in the temporary forfeiture of their Charter. Perhaps also a Table of Cases would add to the utility of the book.

The Law of Pleasure Yachts. By CHARLES F. JEMMETT, B.C.L., M.A., M.L., and R. A. B. PRESTON, M.A. London: Sweet & Maxwell. 1903.

This is a second edition of *Yachting under Statute*, compiled to bring it up to the present state of the law. The object of the original work was to place "before yacht owners in a popular form their exact position in connection with their vessels, the advantages

and privileges which they enjoyed, the duties and responsibilities incumbent upon them, and the liabilities to which they were subject." We notice at the very commencement one feature which we do not think we ever noticed before in a law book. In the place where the list of cases usually comes there is a long list of subscribers, which looks much better. Another unusual feature, and one which we hardly approve of, is that as a rule only references to the report of a case are given and not its name. The book is decidedly practical, and as far as possible dispenses with technicalities—we mean legal not nautical technicalities. The owner is first dealt with, and his title and registry constitute the first chapter. Subsequent chapters deal with his privileges and exemptions, duties and liabilities, powers and rights. It is worth noticing here the advice given to the owner not to enter his own name as master of his yacht, but to rely on his Common law rights, and also to have the usual form of agreement with master and crew altered as suggested in the chapter on Master and Crew. The subjects dealt with in the subsequent chapters are Collision, and Limitation of Liability; Salvage and Towage; Marine Insurance; Pilotage, and Necessaries; Harbours, Docks, Piers, and Moorings; Customs, Light Dues, and Quarantine; and Sea Fisheries and Sea Birds. On all these points a summary is given of the most important legal provisions without wearisome legal details, and useful practical information is given as to how far the law is strictly enforced. There is an Appendix containing Regulations and Navigation Rules of various sorts; and the whole forms a work which every yachtsman should, and—judging by the list of subscribers—a great many yachtsmen will have.

Encyclopædia of the Laws of England. Vol. XIII. Supplement edited by A. W. DONALD, M.A., LL.B. Index prepared by W. BOWSTEAD. London: Sweet & Maxwell; Edinburgh: William Green & Sons. 1903.

The Encyclopædia is a very valuable contribution to legal literature, and was completed some four years ago. The present volume is a supplement incorporating the Statute law up to the end of last session, and the cases up to the end of 1902, and in some instances later. There can be no doubt this adds considerably to the value and utility of the parent work, but if any further supplements are to be issued the form will become inconvenient, although the Index contained in the present volume is one to the whole work, including the volume in question.

The Annual Statutes 1902. By J. M. LELY, M.A. London: Sweet & Maxwell. 1903.

Paterson's Practical Statutes 1902. By JAMES SUTHERLAND COTTON. London: Horace Cox. 1903.

The Parliamentary session of 1902 was not very prolific in legislation, and out of the forty-two Public General Statutes passed, rather more than twenty have been selected for the purposes of these two well-known annual works. As usual, Mr. Lely gives an introduction commenting on all the Statutes at the beginning of his book; while Mr. Cotton prefaces each Statute with an introduction where he considers it necessary. The two Statutes of most importance are the Licensing Act and the Education Act, and both of these are fully dealt with. Mr. Lely has, besides his footnotes to the Education Act, added an useful note upon Trust Deeds and other matters. We notice that he has a doubt as to whether the general opinion, that religious education in elementary schools provided by the head education authority is regulated by the Cowper-Temple Clause, is correct, but we hardly think it is open to question. We quite agree with the note on sect. 28 of the Licensing Act, submitting that "members" there means regular members, but the point is certainly rather doubtful. Mr. Lely reproduces from an article in the November 1891 number of this Magazine some noteworthy "Suggestions for the improvement of the Legislative Machine." Mr. Cotton, by his Table of Principal Enactments repealed, and List of Local and Personal Acts, adds considerably to the utility of his work.

The Annual Digest 1902. By JOHN MEWS. London: Sweet and Maxwell. 1903.

The Yearly Digest of Reported Cases. By EDWARD BEAL, B.A. London: Butterworth and Co. 1903.

A digest of reported cases, whether it be termed Annual or Yearly, is a necessity to the practising lawyer, and the best thanks of the profession are due to the gentlemen who devote themselves to such a laborious and monotonous task. Both these collections cull their decisions from a great variety of reports, and thereby considerably add to the selection made in the authorized reports. We think Mr. Beal has collected the greater number of cases, and on the whole gives fuller information in his notes; but there is not much

difference. It is rather curious to notice that in one case, *Carr* v. *Anderson*, each Editor has reported a decision on a different point, and we prefer Mr. Mews' report, as he gives the report on the point of principle, whereas the other decision is more on a point of practice. In the case of *Lightbody* v. *West* there is a curious error in Mr. Beal's note, the word "suspended" being substituted for word "superadded," correctly given by Mr. Mews. However, we do not think either note satisfactory, as the proposition given seems only to have been used by Sir Francis Jeune as expressing the submission made to him in argument, and not as part of a decision of his own.

Digest of Law and Arbitration Cases. By SIDNEY WRIGHT, M.A. London: Estates Gazette Ltd. 1903.

This Digest has been made from the cases reported in the *Estates Gazette* during the year 1902, and contains a large number of cases, many of which are not to be found reported elsewhere. The subjects are those which are of most interest to the readers of that paper, and deal largely with questions concerning house and landed property. The cases have been tried before a large number of tribunals varying from an Under Sheriff's Jury to the Court of Appeal. Many of them are of no value as authorities, being the decision of an arbitrator or jury on a question of fact, but they may sometimes give useful indications to be taken into consideration in advising. On such a question as Compensation, for instance, a number of cases are to be found. We notice that in one report Mr. Gerald Hohler has rather prematurely been made a K.C.

Encyclopædia of Forms and Precedents. Vol. III. Building Societies—Commission. Edited by A. UNDERHILL, M.A., LL.D., assisted by C. O. BLAGDEN, M.A., and W. E. C. BAYNES, LL.B. London: Butterworth & Co. 1903.

This is a large and important volume as it contains over 800 pages and deals with "subjects many, if not most, of which are out of the beaten track, demanding special knowledge in the Authors, and great care in the Editors." That the Editor has been fortunate in his selection of specialists will be seen at a glance when it is noted that the subject of Building Societies is treated by Mr. E. W. Brabrook, C.B., Chief Registrar of Friendly Societies; Burial by Mr. J. Brooke-Little, and Charities by the Editor, Mr. Leonard S.

Bristowe, Mr. Richard Durnford, and Mr. Lester Guest. Another very important heading, that of Churches, is contributed by Mr. F. H. L. Errington, Mr. G. Pemberton Leach, and the Editor. Charities are given the most space, as they occupy a little over 200 pages; while Churches come second with about 160 pages. Besides the value of the Forms and foot-notes we must call attention to the excellent preliminary notes appended to each subject, which, concise though they be, are of considerable importance, and in the case of Charities consist of more than 40 pages. We turned with interest to the last heading, "Clubs," and find that both the recent case of *Harrington* v. *Sendall* and the many points raised by the last Licensing Act, particularly the difficult questions connected with honorary and temporary members, have been considered, and special provision is suggested to meet the common case of Clubs temporarily exchanging members, as well as a clause providing for the amendment of the rules to avoid the difficulty that arose in the above case.

Powers of Attorney and Proxies. By V. ST. CLAIR MACKENZIE. London: Effingham Wilson. 1903.

This is another of the practical law books published by Mr. Effingham Wilson which are intended more for the use of business men than lawyers; though they are generally useful to the latter in reminding them of prominent principles. Mr. Mackenzie states his object to have been "to provide a useful guide for the 'city man' in whose business career the need of the frequent delegation of his authority and duty becomes every day more important." A number of cases are cited which are useful to lawyers, but not likely to be referred to by the 'city man,' though the statement of the facts is generally full enough to enable him to see what has been decided. The law of Proxies is dealt with in a satisfactory manner, and altogether the object of the work is well carried out.

Second Edition. *The Law relating to Auctioneers, House Agents, and Valuers, and to Commission.* By HEBER HART, LL.D. London: Stevens & Sons. 1903.

Here we find the law treated of relating to a large and important class of agents. The first edition was limited to the law of Auctioneers, and the additional subjects added to the present edition have considerably increased its size, and "about half of the

present text consists of new matter." A good many difficult points are raised, at times, in the business of auctioneers and house agents; and a carefully-written work, like the one we are noticing, devoted to a consideration of their rights, duties, and liabilities, is of great use to them. An auctioneer, practically, requires to have his law at his fingers' ends; as when an awkward question arises in the course of a sale, he cannot retire to his office to look it up, but must decide it, then and there, as best he can. The main part of the work is still devoted to auctioneers; nearly 270 pages out of 403 of the text being devoted to them. The whole course of their business is methodically gone through, from the "nature of an auction" to a "summary of auctioneers' duties and rights." Good practical advice is given from time to time, and warnings against dangers. As an instance, we may refer to the discussion of the not very easy question of under what circumstances an auctioneer would be liable to his principal by accepting or refusing a cheque tendered in payment of the deposit. This Mr. Hart considers "to depend upon whether or not it was reasonable for him to do so under the circumstances of the particular case." This we think is good sense and good law, but the case of *Johnston* v. *Boyes*, which is cited as supporting to "some extent" this and some other propositions, is not of very much assistance. Perhaps one of the most important parts of this book to an auctioneer is that discussing his responsibility as to Delivery and Title. Mr. Hart thinks that in the absence of any express provision to the contrary, when his principal is not disclosed, he would probably be responsible for any failure to make such delivery as is, under the circumstances, to be presumed to have been contemplated by the contract between himself and the purchaser. The research of Mr. Hart has discovered a very recent case not reported in any of the series of law reports, *Holtom* v. *Bentley*, in which the liability of the auctioneer seems to have been carried somewhat further, and his final conclusion is that "it is difficult to arrive at a clear view as to the extent to which the judgment in this case ought to be regarded as a binding authority." The twenty-second chapter contains a good summary of an auctioneer's duties and rights. Only about twenty pages are devoted to house agents, and the law does not seem quite clear as to his power to sign a contract, and it is difficult to reconcile the two cases of *Chadburn* v. *Moore*, and *Rosenbaum* v. *Belson*. Part IV treats of the law of commission and remuneration generally, and in the introduction to

the subject the Author gives some good advice as to the value of reported cases as follows: "In the vast majority of cases to recover commission, the principal question will really be one of fact, as to which in the nature of things no reported case can be absolutely binding and conclusive; and secondly, to lay stress upon the necessity for special care in studying reported judgments, with a view to ascertaining whether, whatever their terms, they are not in substance merely findings upon certain evidence, rather than decisions in which a rule is deliberately enunciated or necessarily involved." A very difficult question to decide is that of succession transactions, as where the third party enters into a further contract with the principal. On this Mr. Hart says "It remains to be decided by the Courts whether an agent is entitled to a commission upon the sale of a house which he was instructed to let or sell, when he has let to a tenant with the option of purchase, and that tenant has subsequently availed himself of the option." An Appendix containing Statutes and Forms and a very good index complete the work.

Third Edition. *Leading Cases in the Criminal Law.* By HENRY WARBURTON. London: Stevens & Sons. 1903.

The issue of a third edition is a mark of success, and on the whole we think that in this case that success has been well deserved. Perhaps the title is slightly incorrect, as we hardly think that the whole of the 134 cases can be described as "Leading Cases." The principle on which the work is composed is a good one, and the notes are concise and carefully phrased. Some of the cases, however, are so shortly stated that they are only useful as references. For instances we may give *R.* v. *Keyn*, and *R.* v. *Clarence.* The full report would be too long for the scheme of this work; but a short summary of the views of the dissenting Judges would have added to the value of the report. Several new cases have been added since the last edition in 1897, but only three of them seem to have been decided since then; namely, *R.* v. *Russell*, *R.* v. *Williams*, and *R.* v. *Gardner.* There is a very useful collection of cases on the somewhat unsettled point of the "Statement of prisoner defended by Counsel," which should be carefully studied by all criminal lawyers. The book must be a very useful one to students, and might often be referred to with advantage by practitioners. We think it would be an improvement if in the next edition the names of the Leading Cases were put in bolder type in the Table of Cases.

Third Edition. *The Law and Practice on Enfranchisements and Commutations.* By A. BROWN. London: Butterworth & Co. 1903.

This book consists of two parts. The first discusses the question of enfranchisement at Common law under the Copyhold and other Acts in ordinary cases, and in extraordinary cases, such as Church Lands, &c. There is also a short chapter on Commutations under the Copyhold Acts, but as all future Commutations under these Acts have been abolished, this subject has not much practical interest. Then come some very valuable practical directions. The Copyhold Act 1894 is given in full, annotated, and there are in the Appendix a collection of forms and precedents, and the text of several Statutes ancillary or relevant. The Author is very learned, and also has a wide practical knowledge of the subject; and proofs of both are to be found abundantly in the work. A report is given of the case of *Humphreys* v. *Blyther*, but we fear the importance of that decision has been rather diminished by the case of *R.* v. *Howard.*

Third Edition. *The Law relating to Electric Lighting, Traction and Power.* By JOHN SHIRESS WILL, K.C. London: Butterworth & Co. 1903.

The first two editions of this treatise dealt with Electric Lighting only, but the present edition embraces the additional subjects of Traction and Power. It is divided into three parts. The first part gives a general view of the legislation for the last twenty years on, and the resulting law of, Electric Lighting. Part II contains the Electric Lighting Acts from 1882 to 1902, Board of Trade rules about applications for Provisional Orders, and the Board of Trade regulations, also Bye-law Forms of Orders, &c. There is also a very important chapter entitled the County of London, which gives the points in which a County of London Provisional Order differs from other Provisional Orders, the question of competition and overlapping in the County of London, and several points connected with testing stations, theatres, and overhead wires. Part III deals with Electrolysis, Traction, and Power. This is subdivided into four sections dealing respectively with Leakage and Electrolysis; Tramways and Light Railways worked by Electricity; Tube and other Railways authorized to be worked by Electrical Power; and Power Acts. The book is written with abundant knowledge, and a marked

feature of it is the number of illustrations given, from actual instances, of the powers and restrictions which Committees have from time to time granted or imposed. This is very noticeable in treating on the important subject of granting compulsory powers to take land, and it is very instructive to notice in what cases the Committees have treated the question of nuisance in the manner recommended by Lord Cross's Committee. That Committee recommended that where the site for a generating station is acquired under compulsory powers, the undertakers should not be subjected to any further liability than that which, according to *Geddis* v. *Bann Reservoir*, is imposed by the Common law in the case of persons exercising statutory powers and duties, but when it is acquired by agreement they think the Common law liability should remain. This recommendation has not been followed by legislation, but is *generally* given effect to by Committees. It may be noticed that the powers given to Electric Light Companies are unlimited in point of time, though a Company is liable to have its undertaking purchased by the Local Authority, and there have not been any provisions introduced in reference to a sliding scale, as in the case of gas undertakings. Both these points are worth the notice of the legislator, if not of the lawyer, and a recommendation was made by Lord Cross's Committee on the second point. The greater part of the book is taken up with Electric Lighting, the older and longer established industry, but there can be no doubt of the growing importance of Traction and Power. There is a long and interesting account of the questions involved in Leakage and Electrolysis, and it is very curious to compare the positions taken by eminent experts who gave evidence on the various Bills where those questions were raised. The special clauses inserted in a number of cases are given, and also the full form of the Model Clause now in use, and an useful summary of the different Orders and Acts in which it is and is not inserted. The history of the Tube Railways and Power Acts is shorter, but not less important, as every year such schemes are likely to increase in number. There is much else worth noticing in this book, and all who are interested in the subjects to which it is devoted can be confidently recommended to refer to it.

Third Edition. *Treatise on Admiralty Jurisdiction and Practice.* By E. S. Roscoe and T. Lambert Mears, LL.D. London: Stevens & Sons. 1903.

The learned Authors have succeeded here in producing a work on a very important branch of law and practice, and that in a volume of moderate size. They have practised the art of conciseness as far as is expedient. For instance, all points are supported by decisions which are sufficient to support them, but we have not noticed many lengthy criticisms and comparisons of cases. Even that of the *Dictator*, which has been so vigorously examined in another leading work on this subject, passes without adverse comment. There is an interesting and learned introduction tracing the history of Maritime law and Courts from the earliest times, and relating the desperate struggle for jurisdiction between the Common law Courts and the Admiralty Courts, in which the former got the better of it. We may notice one little slip where Amalphi (Amalfi) is spoken of as being on the Adriatic. The rest of the work is divided into four parts. Part I contains what we may call the law. It commences with "Salvage," and ends with "The order of Claims." The headings which are most important and most fully discussed are Salvage, Towage, Damage by Collision, and Regulations for preventing Collisions at Sea, but all the other necessary questions such as Wages-Necessaries, Bottomry and Respondentia, etc., are carefully and adequately treated. Part II contains the Practice. There is no treatise on it, but all the rules applicable to the Admiralty Division are given with notes, and attention is called to every point in which the practice in that division is special. A very important and useful feature in connection with this Part is the large number of decisions in chambers which are cited. Part III gives information with regard to Miscellaneous Courts with Admiralty Jurisdiction, such as the Cinque Ports. Part IV deals with a subject the importance of which is at once obvious, namely, Costs and Fees. The Appendices take up nearly 200 pages, and contain the Judicature Act 1873; the Admiralty Courts Acts of 1840 and 1861, and parts of the Merchant Shipping Act 1894. The rest is composed of a large number of forms and precedents, including several precedents of bills of costs. The whole is most carefully arranged for the convenience and profi of those who consult it.

Fourth Edition. *Kerr on Injunctions.* By EDGAR PERCY HEWITT, LL.D., assisted by SYDNEY E. WILLIAMS, and JOHN M. PATERSON, M.A., LL.M. London: Sweet & Maxwell. 1903.

We are glad to welcome a new edition of *Kerr on Injunctions*, and notice that it appears under new editorship. There has been no new edition for fourteen years, and during that time decisions have accumulated. It says much for the skill with which it is edited that, although the present edition has been largely revised and re-written, it has not sensibly increased in bulk. One of the greatest difficulties in bringing out a new edition of a well-established law book is to know what to leave out. It has long been the established authority on Injunctions, and the care with which the present edition has been edited gives every hope that that position will be maintained. A number of new cases have been decided on every branch of the subject, notably on patent and copyright; but what has struck us most in looking through the book, is the change which has taken place in the attitude of the Courts towards covenants in restraint of trade, and the development of a distinct branch of the law, with a number of important decisions, on "nuisances connected with trade disputes." On the first point it was laid down in the last edition that "covenants in total restraint of trade are absolutely void upon grounds of public policy." This is repeated, but is certainly qualified if not contradicted in a paragraph a little further on by the sentence "Notwithstanding the older cases, however, it seems to be settled that a restraint, however general, will be good if it is under the circumstances reasonable," and for this is cited the case of *Maxim-Nordenfelt etc. Co.* v. *Nordenfelt.* The other question of "nuisances connected with trade disputes" is entirely new and very important, and the law on the subject is likely to be further augmented either by cases, or legislation, or possibly both.

Sixth Edition. *The Employers' Liability Act 1880*, and the *Workmen's Compensation Acts 1897* and *1900.* By ALFRED H. RUEGG, K.C. London: Butterworth & Co. 1903.

Eighth Edition. *Workmen's Compensation Acts 1897 and 1900.* By W. A. WILLIS, LL.B. London: Butterworth & Co. 1903.

Workmen's Compensation Digest, 1897—1902. By A. T. GLEGG and MAX A. ROBERTSON. Edinburgh: William Green & Sons. London: Stevens & Sons. 1902.

Mr. Ruegg has had a very long experience in cases under these Acts, and another edition of his well-known work is welcome. Perhaps as the volume of the litigation of this nature seems to be growing smaller, we may see new editions of this work appear now at longer intervals, but they are sure to be edited with the same care and knowledge. The arrangement of Mr. Ruegg's work follows the usual and best lines in first dealing with the employer's liability at Common law, including the famous doctrine of "common employment." Mr. Ruegg makes no effort to defend this doctrine which he considers unjust to workmen, founded on unsound reasoning, and carried to an extent which was in practice inconvenient and even harsh. When he comes to deal with the Employers' Liability Act 1880, Mr. Ruegg does well to remove the common misconceptions of the object of that Act, and to point out that all it does is to deprive an employer of the special defences he before had when sued by his servant. There is a full consideration of the liability imposed by the Act, and an examination of the vexed question of the effect of the doctrine *Volenti non fit injuria.* One of the subjects most fully dealt with in treating on the Workmen's Compensation Acts is the doubtful question as to what is a factory. This Mr. Ruegg considers "one of the most puzzling matters in the whole Act," and gives it most careful study. We are interested in reading the chapter on building to notice that in earlier editions the opinion was expressed, that if machinery was used in the construction or repair of a building such building must still be over thirty feet in height to be within the Act. This was certainly our impression when we first read the Act, but the Court of Appeal in *Miller* v. *Tompkinson & Co.* has decided otherwise. The whole subject is most thoroughly treated, and the Appendix contains the text of the Acts, forms, and rules.

Mr. Willis's little book is well arranged, clear, and handy, and the number of editions it has gone through shows that it has been appreciated by its readers.

The Digest of Cases under these Acts is very full and complete. We were puzzled at first to make out on what system the cases were arranged, as they did not seem to be grouped on any principle, but at last we discovered that it was strictly chronological. We do not recollect having ever before come across a Digest arranged on this principle, which we do not think a good one; but its defects are mitigated by a good index. The get-up of the book is very good.

Twenty-fifth Edition. *Handy Book on Joint Stock Companies.* By F. GORE-BROWNE, M.A., K.C., and WILLIAM JORDAN. London: Jordan & Sons. 1903.

Mr. Gore-Browne and Mr. Jordan are to be commended for the despatch with which they bring out new editions of this most useful work. The last edition was published in March of last year, and the present one is published this autumn. In the preface Mr. Gore-Browne notices several important decisions which have been given in that short time, and which quite justify the issue of a new edition. There is one important alteration in practice as to the allegation and proof of assets. The new cases which seem the most important are *In re Harrogate Estates Limited*, where Buckley, J., discusses sect. 14 of the Companies Act 1900 in several aspects, and draws from it something like five conclusions. Another important case is *Hilder* v. *Dexter* which overrules *Burrows* v. *Matabele Gold Reefs and Estates Co.* Mr. Gore-Browne calls attention to a rather curious fact, namely, "that a greater number of decisions upon the effect of failure to comply with sect. 38 of the Companies Act 1867 have been given since its repeal than ever before." Another important question which has excited great public interest recently is the Criminal Liability of Directors for issuing false Balance Sheets. This is referred to more than once in reference to the case of *In re London and Globe Finance Corporation.* Another point to which Mr. Gore-Browne calls attention is the doubt which hangs over the question how far a Company may pay dividends when its capital has been lost. This is discussed at some length, and it is pointed out that the House of Lords, in *Dovey* v. *Cory*, unsettled previous opinion "that fixed capital lost in one year need not be made good in subsequent years before a dividend was declared out of the profits," and that this doubt had been increased by the recent decision of Farwell, J., in *Bond* v. *Barrow Hæmatite Steel Co.* The convenient size, clearness of expression, and soundness of judgment shown in this Handy Book make it invaluable to business men and most useful to practitioners.

CONTEMPORARY FOREIGN LITERATURE.

La Fonction du Droit Civil Comparé. Introduction. By EDOUARD LAMBERT, Professor of the History of Law at the University of Lyons. Paris, 1903.

This large volume of nearly a thousand pages forms an introduction to what will be an encyclopædiac work, to be called *Études de Droit Commun Législatif ou de Droit Civil Comparé.* In spite of its size, the book is one which can be read with profit from cover to cover. The number of authorities cited is enormous, and—if for nothing else—the book will always be valuable for bibliographical purposes. English authorities occupy a prominent place, though the learned author holds the opinion—possibly justified—that the position of England in juristic science is a low one, and out of all proportion to her advance in material prosperity. The main object of the introduction is to show that what may be called the German theory of custom, founded on that of the later Roman jurists, will not explain the phenomena of early law as we know it in the Roman, Hindu, Mosaic, Islamic, old French, English, and other systems. Custom, says the German theory, combines the external unconscious element or repetition of acts *(consuetudo)* with the internal conscious element or sentiment of obligation *(opinio necessitatis)*, the latter supplementing the former as conscience becomes educated, and becoming *Juristenrecht* as opposed to primitive *Volksrecht.* Savigny lays stress on the first, Von Ihering on the second. All this is too refined for Professor Lambert, who says that it fails to explain the unscientific growth of case-law. On the whole he seems to incline to Austin's view.

Two points may be singled out as leading to discussions of peculiar interest. The first is the author's view that contemporary authorities on Roman law begin at the earliest with the second Punic war, and that early custom does not appear to us as it existed, but as it appeared to those who from ignorance of the process of development misread it at a subsequent period. The second is the view of the history of majority as a governing principle in politics. Its origin is possibly to be found in its convenience as a rough and ready test of the presence of *frequentia*, such an important element in the mediæval conception of custom. It is not primitive, says the author, for does not the Mosaic system in Exodus xxiii, 2, emphatically repudiate the opinion of the majority as a factor in judgment?

We might possibly go further than Professor Lambert, and find another modern doctrine evolved from ancient custom. Modern theories of representation may not improbably have been suggested—at any rate in part—by the early view that magistrates might represent the people in authoritative exposition of custom. The learned Author's treatise gives ground for thought on these among many other matters, and the continuation will be awaited with interest.

La Nozione del Torto nella Dottrina e nella Giurisprudenza Inglese. By MARIO SARFATTI. Milan, 1903.

In the February number of the *Law Magazine and Review* a small book by the same writer on the English Law of Contract was reviewed. The volume on torts shows an adequate acquaintance with the main English authorities on the subject, though they are sometimes hardly recognisable in their Italian dress. Instances are "Genks," "lord Justin Mellick," "lord Gustaw Janes," "Sir Frederic Flesiger," "Emfloyers and Warhmen."

PERIODICALS.

Journal du Droit International Privé. 1903. Nos. VII—X. Paris.

These numbers contain interesting decisions from the better known countries, and in addition from Brazil, Crete, and Monaco. From a Greek decision (p. 910), we learn that Greek subjects marrying in Greece must have the authority of an orthodox bishop, but that this does not apply to the marriage of such persons in a foreign country.

Juristen-Zeitung. 15 July—1 October. Berlin.

The number of 15 July contains a useful *Spruchsammlung* or digest of such decisions on the Civil Code as have so far been judicially interpreted. The double number of 1 September contains a curious article on the possibility of attaching for debt telephones and telephone rights. The bibliographical section of this number shows the enormous amount of legal literature now produced in Germany. Apparently the *Law Quarterly Review* is the only English work known to the editors.

La Giustizia Penale. 24 June—16 September. Rome.

There are of course numerous decisions on points which would be quite foreign to English law. A Messina Court decided that, where a husband by tacit assent of his wife administered the dotal estate, he could appear as *parte civile* in a prosecution for forcible entry on the estate (p. 992). The recent law against the unauthorised sale of antiquities applies to objects not named in the official catalogue of antiquities.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space :—*The Official Reports of the High Court of the South African Republic*; Adler's *Law of Corporations*; Piper's *House Tax Laws*; Miller's *Data of Juris prudence*; Stephen's *Commentaries*; Hayford's *Gold Coast Native Institutions*; Walton's *Introduction to Roman Law*; Morice's *English and Roman-Dutch Law*; Chalmers' *Bills of Exchange*; Jelf's *The Education Act*; Freeman's *Guide to Probate*; Van Veeder's *Legal Masterpieces*; Solomon's *Manual for Colonial Commissioners*; *Commercial Law Reports of Canada*; *The Middle Temple Records*; Wilson's *Digest of Anglo-Muhammedan Law*.

Other publications received :—*Le Canal Transisthmique.* By Chas. H. Huberich. *The Humane Review* for October.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications :—*Review of Reviews*, *Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*, *Japan Register*.

THE

LAW MAGAZINE AND REVIEW.

No. CCCXXVII.—February, 1903.

I.—THE LIABILITIES OF A CONQUEROR.

THE correspondence between Mr. Chamberlain and General Louis Botha in reference to the "Appeal of the Boer Generals to the civilised world"[1] treats in the main of matters of policy which are not within the scope of this Magazine. But there is one passage in General Botha's letter of the 12th November, in which he reiterates, though in a modified form, a claim put forward at the time of the negotiations of 1901, that this country is bound to discharge the whole of the liabilities of the conquered States, and this raises an important question of International law. "Our view is," he says, "that having taken the assets of our "Governments, you may fairly be expected to meet their "liabilities, not in part, but in full." This is now put as a matter of fairness. In 1901 it was put as a matter of right on legal advice. "A sort of payment for goods taken by our "commandos from the burghers is offered which will not be "in the slightest degree sufficient. Even if it comes to the "worst, the enemy, as General Botha rightly remarks, will be "compelled, according to all civilised laws and usages, when "it takes over the assets of the country, also to assume the "obligations."[2] And from this and other documents it is

[1] Parl. Papers, Cd. 1329.
[2] Proclamation of De Wet, 1st April, 1901. Parl. Papers, Cd. 663, p. 9.

clear that the obligations to be assumed by this country included, according to the Boer contention, debts contracted since the war began, including the actual costs of the war.

The proposition that a conqueror is bound to assume the liabilities of the conquered, if carried to these extremes, becomes too extravagant for consideration. A successful litigant cannot be required to pay the costs incurred by his defeated opponent, and it is certain that no conqueror ever has said or ever will pay the costs of hostilities directed against himself. But within narrower limits it has more show of reason. To some lesser extent there is a liability imposed on the conqueror, and this His Majesty's Government have never denied. The extent of liability, however, is a matter of great uncertainty, owing to the absence of any accepted principle of determination. No general principle has as yet obtained the sanction of international usage: indeed, as regards titles by conquest alone, so far as that differs from other successions, there has been practically no usage, for such titles are almost unknown in modern history. Nor have the deliberations of jurists as yet resulted in any agreement. The topic has been discussed from the time of Quintilian to the present day, and Huber has recently developed it in detail;[1] but no definite result has hitherto been attained. The researches of the Concessions Commission have forced them to the conclusion that there is no established rule of International law on the subject.

The case of the South African Republics will form a valuable precedent for the future, but until the intentions of His Majesty's Government are more fully declared comment on that case would be premature. In the meantime, however, it may be useful to recall the lines on which discussion has hitherto proceeded, and to point out certain considera-

[1] *Die Staaten Successionen*. Leipzig, 1898.

tions which seem to afford some guidance on the general question.

It will be found on referring to the authorities that the succession of States on conquest has been regarded, at least by the earlier writers, from either the one or the other of two different points of view: (1), the one that the conqueror is a mere trespasser, that he has a possessory title only, and can claim no property other than that over which he has obtained actual control; (2), the other that he becomes, as soon as his title by occupation has matured into sovereignty, the successor "*in universum jus*" of the defunct State, that he then takes over the contracts, obligations, and debts of that State, and stands for all purposes in the shoes of the latter. Each of these propositions is founded on the analogy of private law, and it is because the succession of States is essentially distinct in character from private successions that neither proposition has been found to afford a satisfactory basis for a law of nations.

The analogy of trespass is attractive at first sight, because undoubtedly it represents the nature of a conqueror's title in its inception, and there is no definite point of time at which it can be said that that title has ceased to be "might" and become "right." In this view there is no succession, and the conqueror's title is limited to property of which he is actually seized or possessed. It follows that "if the debts due to the State "be situated not in the conquered country, but either in an "unconquered or in a neutral country, there is no doubt "that they are not within the imperium of the conqueror."[1] But this view cannot be regarded as satisfactory, because it leaves out of sight the rights of other Powers. If this were the law, a conqueror could disclaim all responsibility for the liabilities of the conquered: a position which it is certain would not be admitted by neutrals. It might perhaps be

[1] Phillimore, III, 826.

said that a conqueror holding assets of the extinct State, if only by right of seizure, would be bound by obligations binding those assets. But if that were so, he could not in fairness be denied the right to recover other assets which formed part of the security for the same obligations, even though they were outside the conquered territory. He could not be made subject to the burden, and denied part of the benefit. And this right, if admitted, is wholly incompatible with the theory of a title limited to possession. Moreover, this opinion is based on a distinction between a title by bare conquest and a title by conquest confirmed, as is usual, by subsequent treaty. In the latter case the conqueror can no longer be a trespasser: he has become an assignee or a successor. But it is obvious that as regards third Powers such a distinction cannot be maintained; their position cannot be affected by the fact that the conqueror does, or does not, elect to enter into a treaty with the conquered.

The second point of view is stated by Halleck[1] in these terms:

> "Complete conquest, by whatever mode it may be
> "perfected, carries with it all the rights of the former
> "government: or, in other words, the conqueror
> "becomes as it were the heir and universal successor
> "of the defunct or extinguished State."

or in the words of Calvo—

> "La conquête, une fois qu'elle a revêtu son caractère
> "complet et définitif, absorbe l' intégralité des droits
> "du souverain qu'elle dépossède. Le conquérant entre
> "donc en pleine jouissance, pour en user et en
> "disposer en toute liberté et sans réserve aucune,
> "non seulement de la propriété corporelle c'est-à-dire
> "des biens meubles de l'État conquis, mais encore

[1] II, 495.

"de ses propriétés iucorporelles, contrats, obligations, "dettes actives, etc."[1]

It is claimed for this proposition that it was accepted as correct by the Amphytrionic Council in the case of the Thessalonian loan. But the authority of that Council can hardly be considered of itself conclusive at the present day, and in this particular case not only are the facts in some doubt, and the reasons on which the Council proceeded unknown, but the effect of the decision itself is only "inferred from Quintilian's silence."[2] In 1831 the German University, to whom was referred the claim of the Prince of Hesse Cassel against the assignee of Count Von Heln, declared that the principle of the Thessalonian case was "sound law, and had been so treated by almost all jurists, ancient and modern," but this dictum does not appear to be well founded. The case has furnished a text for almost every commentator on the subject, and in that way has proved of value, but the principle assumed to have been laid down in it has certainly not obtained the acceptance which is claimed.

But, however that may be, it is clear that the principle of universal succession cannot be adopted in practice, unless it be subject to such numerous limitations that the principle becomes swamped by the exceptions. The Concessions Commissioners have pointed out three classes of cases in which an annexing State manifestly cannot be treated as a successor. "An insolvent State could not by aggression, "which practically left to a solvent State no other course "but to annex it, convert its worthless into valuable obliga-"tions." Again, an annexing State would "be justified in "refusing to recognise obligations incurred by the annexed "State for the immediate purposes of war against itself, "and probably no State would acknowledge private rights,

[1] IV. s. 2483.
[2] Phillimore, III, 833.

"the existence of which caused or contributed to cause the "war which resulted in annexation;" and these instances do not exhaust the list of necessary exceptions.

And apart from this objection, it is certain that no State will consent to assume liability for every tort of its predecessor, or hold itself bound by every contract to which the former State was a party. The theory of universal succession is indeed based on a fallacy: it assumes the occurrence of a succession: but in fact there is no succession in the sense in which that term is used. The conquering State is a distinct and different personality: it does not stand in the shoes of the State it has conquered, but brings its own shoes with it. It would be unreasonable to contend that contracts of a kind personal to the extinct State, or contracts by their very nature dependent on the continued existence of that State, were binding on the new State. It could not be contended, for instance, that Great Britain was bound by a contract entered into by the South African Republic for the erection of a statue of ex-President Kruger, or a column to perpetuate the victory of Majuba Hill, and it would be absurd to insist that compensation should be paid if the continuance of such contracts was not recognised. The reason why such contracts cannot bind the conqueror is, that he is not identified with the conquered, but is a distinct personality, and not a "successor" in the sense in which that term is used in private law.

Difficulties such as these appear to have convinced Huber that there cannot be a "*successio in universum jus*" as between States, but he suggests that there is a succession of a special kind, in which the successor steps into the rights and liabilities of his predecessor *as if they were his own.* The meaning of this qualification may be best explained by observing it in its application to the particular case of concessions. In Huber's view a successor is *primâ facie*

bound by all the concessions granted by his predecessor, but, inasmuch as he is a distinct personality, he cannot be required to continue any concessions which conflict with the public law and policy of his own State: for that must now prevail in the conquered territories. He therefore has a right to terminate concessions which come within this category, but he may only do so on payment of compensation. The importance of this distinction is not easy to appreciate. Every Government is justified in putting an end to every concession, or in appropriating any other property on payment of compensation. It is a right exercised in this and every other country, and applies equally to the property of nationals or foreigners. The construction of a railway, the taking over of a private undertaking by the State or a municipality, under compulsory powers, involve the termination of private rights, but the power under which this is done is inherent in Sovereignty, and does not specially come into being on a succession, nor apply only to one particular class of concessions. The practical result of this theory appears to be that the successor is bound by all the concessions of his predecessor.

The attention which Huber has devoted to the subject, even if there were no other reasons, would entitle his conclusions to the greatest weight, and it may be that they will be ultimately accepted as a correct exposition of the Law of Nations: at present they cannot be regarded as more than an attempt, however valuable, to formulate the matter on a scientific basis.

In the absence of any accepted principle of law some guidance may, it is thought, be obtained from a consideration of the actual position created by conquest, and of the effect of conquest on treaties to which the conquered State was a signatory. The parties affected by the change of Sovereignty, in cases where the conquered State has ceased to exist, are (1) the conqueror, and (2) neutral States who

had claims either directly or on behalf of their subjects against the extinct State. The position is, that the conqueror has obtained possession of the conquered territory, but to consummate his conquest he desires to have his title recognised by other Powers. The neutral States are willing to accord that recognition, but only on the terms that the conqueror accepts some portion at least of the liability of the defunct debtor. In the opinion of Rivier this is the position in law as well as in fact.

"Les principes de la succession des États ne sont donc, "à proprement parler, pas obligatoires pour le conquérant, "puisqu'il ne tient que de lui-même sa souveraintê sur le "pays conquis. Cependant les puissances tierces ont des "droits acquis, qu'elles pretendront conserver et voudront "faire respecter, et l'intérêt même du conquérant doit "l'engager, surtout s'il désire en obtenir la reconnaissance "de sa conquête, à se faire considérer par elles comme le "véritable successeur de l'État qu'il a dépossédé."[1] The question in this view resolves itself into one of "give and take," and the difficulty is to find some reasonable basis for settlement between the two parties.

Now the claims of neutral States *quâ* States in general arise out of treaties, and the extent to which a conqueror is bound by treaties has been determined with some particularity by usage. It may be taken to be a rule of International law, that the successor is bound only by those treaty rights which can be said to inhere in the soil, like the easements on servitudes of private law, and is free from all obligations which were merely personal to the late Sovereign, though they might have had to be performed on the territory. Treaties of alliance, commerce, navigation or extradition, come to an end on the extinction of a signatory State, but treaties affecting the territory itself, *e.g.*, for cession, mortgage, creation of servitudes, or delimitation of bound-

[1] *Principe du Droit des Gens.* Rivier, II, 438.

aries remain in force. The underlying principle seems to be that the successor who takes the territory of the extinct State takes it subject to the rights of other Powers, so far as those rights affect the territory, but that he is not bound by other obligations.

This appears to have an important bearing on the question under discussion, for the claims of neutral subjects cannot on any principle be in a better position than those of neutral States. Their contracts or concessions must be governed by the same considerations which apply to treaties: and it is not easy to see any ground on which a conqueror can be asked to undertake a greater obligation in respect of the former than he is compelled, according to International law, to do in respect of the latter. We seem, therefore, at this point, to have got into touch with a principle which may possibly afford a basis for settlement, and which has, at any rate, been already adopted into the Law of Nations in the analogous case of treaties. The extension of this principle to other obligations finds support in the present practice as to concessions. It is believed that railway, mining, and cable concessions which of themselves confer an interest in the soil, have invariably been treated as binding in recent years.

Of itself this principle has a good deal to commend it: "Qui sentit commodum sentire debet et onus" is a well-known maxim of English law, and embodies a proposition which is equally reasonable whether applied to public or to private law. The conqueror who takes the benefit of the assets of the conquered, may fairly be called on to discharge the burdens which have become attached to those assets. He cannot claim to have acquired by conquest a greater interest in them than the conquered had at the time of conquest.

The distinction between claims attached to the assets and those not so attached is perhaps at first sight somewhat

vague: what is suggested is, that mere claims against the extinct State, which might be satisfied at some future time if the surplus revenues were sufficient, are not attached to the assets: rights granted in the territory or debts expressly charged on the assets are so attached. Public debt, if not expressly so charged, would be treated as impliedly charged and responsibility for it assumed by the conqueror, subject, it is submitted, to the exception that in cases where the security for the debt was increased by the conquest, the creditors might properly be asked to abate their claims in proportion to the enhanced value of their security. This would be in accordance with the general usage by which a successor does accept liability for public debt.

If a settlement were made on these lines, there would be at once excluded all claims for torts, and all claims arising out of contracts (as distinct from concessions), whether executors or executed, except in the cases in which an actual right in the territory or an express charge on the assets had been created, and except in the cases in which the conqueror had reaped the benefit of the contracts and had to that extent adopted them. In other cases of contract he might fairly claim to repudiate liability. Indeed, he might with some reason contend that his predecessor had expended in belligerent operations directed against himself the moneys which should have been devoted to discharging these current liabilities. "Concession" is a term of some ambiguity, but in general imports a contractual right of a semi-public character. Applying the suggested test to such concessions, the result would be that railway, mining, and cable concessions and the like, and concessions for public works, would continue unaffected, because they are in the nature of rights in the territory, and because the succeeding State obtains the benefit of the expenditure incurred in respect of them. This, as has been said, is in accordance with present usage.

Trading concessions on the other hand would lapse: and this may be right. They cannot be in a higher position than Tariff treaties, and it is accepted law that Tariff treaties do not bind a successor. Moreover, trading concessions are in general dependent on the maintenance of a separate frontier, and there can be no duty on a conqueror to maintain such a frontier, at any rate in the case which frequently happens of the absorption of the conquered territory into that of the conqueror; nor does it seem reasonable to ask her to pay compensation because he is unwilling in such a case to maintain an artificial frontier solely for the benefit of the concessionaire. It is to be observed that if this basis of settlement were adopted, a conqueror would be entitled to demand possession of assets of the extinct State outside the conquered territory. It may be that he would be unable to do so effectively by legal proceedings, but he could make it a term of his acceptance of liability in respect of the assets which he had got, and leave the neutral in whose territory they were to recover them for him by legislation if necessary.

It cannot be said that an assumption of liability based on this principle would be other than reasonable in its result, and it can be claimed for it that it is in accord with the rule already in force in regard to treaties and the usage in regard to concessions conferring an interest in the soil. In this view General Botha's claim is excessive, in so far as it asserts liability for all the obligations of the Boer States, but is correct in so far as it alleges, as the basis of liability, the fact that His Majesty's Government have taken over the assets of those States.

Whatever limitation of liability may ultimately be recognized, one result at least seems certain, viz., that no State can ever be bound by the personal obligations of its predecessor. Claims for torts and claims arising out of contractual obligations, of their very nature dependent

on the continued existence of the defeated State, cannot, as has already been observed, survive conquest. No neutral Power could with any show of reason maintain that this country was liable to pay compensation because the South African Republic had failed to sufficiently protect the property or person of a subject of that Power, in some former time of riot or native trouble, or had without cause expelled such a subject from the Transvaal. For the personal acts of the conquered State the conqueror cannot, it is thought, be held responsible. And the same may be said of contracts of the class to which we have referred. Contracts extending over a term of years for the supply of uniform to the Transvaal troops, or of stamps impressed with the Transvaal arms, could not reasonably be held binding on Great Britain. And other more extreme instances have been given in a previous part of this article. Such contracts must necessarily be dependent on the continued existence of the South African Republic, and when that State ceased to exist the contracts must have come to an end. The costs of the war would be excluded on somewhat similar grounds. The creditors would be taken to have supplied their goods on the credit of the defeated State only, and with the knowledge that the opposing State, if successful, would not pay for them. It may be that the exception of personal liabilities of this kind will ultimately come to be the only limitation on the liability of a successor. And there is much to be said for such a rule in these times of far-reaching commercial interests, subject always to such qualifications as may fairly be imposed in the case of the substitution of a solvent for an insolvent State and the like. If that be so, the basis of liability will be somewhat more wide than if the test were that first suggested. In particular, trading concessions will come to an end only if it appears that they are from their nature dependent on the continued existence of the defunct State. Undoubtedly

the current of modern opinion favours the extension rather than the restriction of liability, but we doubt whether any State would be prepared at present to accept this wider liability without reserve.

It is not possible at the present time to do more than discuss the reasons on which a rule of International law may ultimately be founded applicable to all the questions that arise on a succession of States. The only liabilities, of which it can at present be said that they undoubtedly continue, are those arising out of public debt or of treaties and concessions conferring rights in the territory itself, to which allusion has already been made, and even these must be in some cases subject to modification. Beyond that there is as yet no certain practice, and it may be that no further liability will be imposed. But it is obvious that, apart from any duty imposed by law, the extent to which a conqueror is willing to assume liability must be largely determined in every case by motives of policy, and that many claims will be admitted as a matter of grace which could never be insisted on in law, a fact which should not be forgotten in the examination of precedents. So far as considerations of policy may be taken into account in determining the legal position, it seems certain that the policy of this country should be to maintain the validity of concessions to the widest possible extent. In the particular case of the South African Republics, we have for the moment an opposite interest, but the large number of concessions held by British subjects in all parts of the world is of itself a sufficient argument as to what our ultimate policy must be.

H. Erle Richards.

II.—COMPENSATION OR DAMAGES AFTER COMPLETION.

THE cases in which the purchaser seeks compensation or damages after completion of the purchase may conveniently be classified under three heads, namely: (1), where the vendor's title proves defective; (2), where there has been misrepresentation as to the quality or quantity of the property sold; and (3), where there has been some collateral undertaking on the part of the vendor. In dealing with this subject it is proposed to dismiss at once those cases, of which *Hart* v. *Swaine* (7 Ch. D. 42) is an instance, in which the vendor has been guilty of fraud. "*Fraus omnia vitiat,*" and it is of course beyond dispute that if the conduct of the vendor has been fraudulent, the purchaser may either claim damages for deceit or set aside the transaction altogether.

I.—With regard to the first class of cases, namely, where the vendor's title proves defective, it would seem that the only remedy of the purchaser is an action for breach of the covenants for title contained or implied in the conveyance. In some cases, an action on the covenants for title affords adequate relief.[1] But probably in the majority of cases the covenants for title (if *any*) do not cover the defect, and in such cases the purchaser would seem to have no remedy. Even if the title of the vendor proves absolutely and entirely worthless, a purchaser who has entered into possession cannot maintain an action for money had and received;[2] nor in any case could such an action be maintained if the purchaser, knowing the vendor's title to be doubtful, agrees to take it for better or worse.[3]

[1] See *Page* v. *Midland Railway Company* ([1894], 1 Ch. 11; *May* v. *Platt*, [1900], 1 Ch. 616).

[2] See *Blackburn* v. *Smith* (2 Exch. 783); *Hunt* v. *Silk* (5 East, 449).

[3] See *Griffin* v. *Caddell* (9 Ir. R. C. L. 488; and *In re Scott and Alvarez*, [1895], 2 Ch. 603.)

Except *Bingham* v. *Bingham* (Ves. Suppl. 79), no authority can be found for the proposition that a completed conveyance can be set aside and the purchase-money recovered on the ground that the vendor had no title. In that case the purchaser, who is stated to have been "ignorant of law and persuaded by the defendant and his scrivener and conveyancer," purchased an estate which was, in fact, already his own property. The decision cannot be explained on the ground of fraud, since the report expressly mentions that "no fraud appeared." It is remarkable that in the other report of this case, in 1 Ves. Sen. 126, no mention is made of the fact that the conveyance had been completed, and the case is treated as an agreement by Lord Cranworth, in *Cooper* v. *Phibbs* (L. R., 2 H. L. 164), and by Lord Lindley, in *Huddersfield Banking Company* v. *Lister* ([1895], 2 Ch., at p. 281). In *Hitchcock* v. *Giddings* (4 Price 135), a purchaser bought the supposed interest of the vendor in a remainder in fee, expectant on an estate tail which had, in fact, been barred by a recovery, although both parties were ignorant of this fact. In that case the conveyance had been executed, but the purchase-money had not been paid, and the vendor was seeking in effect to enforce specific performance by compelling the purchaser to pay for what he had not got. This decision is not, therefore, an authority for the proposition that the purchase-money can be recovered by the purchaser after completion, even where there has been an error *in substantialibus* common to both parties. The point is considered and left doubtful by Byrne, J., in *Debenham* v. *Sawbridge* ([1901], 2 Ch., at p. 109).[1]

Where the title of the vendor is only partially defective, it is clear that the purchaser has no remedy apart from the covenants for title; at any rate, in the absence of any express condition as to compensation. He cannot sue for money had and received (see *Clare* v. *Lamb*, L. R., 10 C. P. 334),

[1] See also *Jones* v. *Clifford* (3 Ch. D., at p. 791).

nor can he obtain rescission in equity (see *Tyrell* v. *Tyrell*, 82 L. T. 675). In *Clayton* v. *Leech* (41 Ch. D. 103), the Court of Appeal held that a purchaser could not recover compensation after completion for a defect of title. In that case, however, there was no condition as to compensation in the contract of sale, and Cotton, L.J. (at p. 107), expressly based his judgment on this fact. The Court has now, however, held in *Debenham* v. *Sawbridge* ([1901], 2 Ch. 98), that a condition as to compensation does not apply to a defect of title.

It is frequently an extremely perplexing question to decide, whether the defect complained of is a "defect of title" within this principle or merely an "error of description," and the judgment of Byrne, J. ([1901], 2 Ch., at p. 107), does not throw much light on this point. The learned judge there states that, although a condition as to compensation does not apply to a defect of title, it does apply to "an error in the *tenure* or *amount* of the vendor's interest." It is submitted that an error as to tenure or amount, *e.g.*, copyhold described as freehold, or an underlease described as a lease, would really be a defect of title. Undisclosed easements over the property are also defects of title, and yet such defects have always been held to be within the condition as to compensation.[1] In *Ashburner* v. *Sewell* ([1891], 3 Ch., at p. 409), Chitty, L.J., expressly held that "there may be errors within clause 6 (the condition as to compensation) which are also objections to title." In *Rudd* v. *Lascelles* ([1900], 1 Ch., at p. 820), Farwell, J., assumed that a restrictive covenant would come within an express condition as to compensation, although there is a *dictum* to the contrary by Lush, J., in *Phillips* v. *Caldelaugh* (L. R., 4 Q. B., at

[1] See *Ramsden* v. *Hirst* (4 Jur., N. S., 200); *Heywood* v. *Mallalieu* (25 Ch. D. 357). In *Painter* v. *Newby* (11 Hare 26), where property was described as customary leasehold, renewal every 21 years, the purchaser was held to be entitled to compensation under an express condition for the absence of any right of renewal.

p. 162), where, however, the condition did not apply to omissions.

In *In re Arnold* (14 Ch. D. 273), and *Jacobs* v. *Revell* ([1900], 2 Ch. 858), defects of title as to part of the property sold were assumed to be within the condition as to compensation, although in those cases the Court refused to force the title on the purchaser. Finally, in *Brewer* v. *Hankin* (80 L. T. 127), Stirling, L.J., held that the non-disclosure of a public sewer was an "omission" in the particulars within the condition as to compensation, although he expressly pointed out that there was "a portion of the property" (*i. e.*, the barrel of the culvert, which was vested in the local authority) "to which the vendor has failed to make a title."

It seems impossible to distinguish *Debenham* v. *Sawbridge*, where it was discovered after completion that the vendor had no title to part of the property sold, viz., certain dwelling-rooms and a cellar, from *Brewer* v. *Hankin*.

The case of *Ex parte Riches* upon which Byrne, J., relied, appears to be a decision of the Court of Appeal in 1883, just before the death of Sir George Jessel, and is only reported in a note in the 27th volume of the *Solicitors' Journal* (p. 313). Jessel, M.R., does appear to have laid down in that case that a defect of title cannot be within the condition as to compensation, but the grounds given for this conclusion are far from satisfactory. The learned judge says: "Suppose the vendor had only a life estate in the whole property, could the purchaser have been compelled, if this had been discovered before completion, to take the life-estate with compensation instead of the fee? It would be monstrous to suppose that he could." This, however, does not dispose of the whole case, because it is well established in a series of decisions that a man cannot be compelled to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that

he bought. In such cases the misrepresentation vitiates the whole contract, including the condition in question, but only vitiates it presumably at the option of the purchaser. If the purchaser elects not to repudiate the contract, but to treat the defect as a subject of compensation, it is submitted that he is entitled to do so (see *Lett v. Randall*, 49 L. T. 71). It is certainly remarkable that if a new principle was laid down in *Ex parte Riches*, the case was not more fully reported, and that such learned judges as Lord Justice Chitty and Lord Justice Stirling should have ignored the principle in subsequent decisions.

Notwithstanding the decision in *Debenham* v. *Sawbridge*, it seems by no means clear that some defects of title may not be within the condition as to compensation; and if they are covered by the condition, it would seem to follow that a purchaser is entitled to compensation even after completion.

II.—The second class with which it is proposed to deal, viz., misrepresentations as to the quality or quantity of the property sold may be subdivided into (1) cases of misdescription in the contract of sale or the particulars embodied in that contract; and (2) innocent misrepresentations made dehors the contract by the vendor or his agents.

When the misdescription is in the contract itself it seems clear that, apart from express condition, the purchaser can have no relief (see *Joliffe* v. *Baker*, 11 Q. B. D. 255). In *Greswolde-Williams* v. *Barnaby* (83 L. T. 708), an action was brought, after completion, for breach of alleged warranty in the particulars of sale that the drains were in a perfect condition. Wills, J., dismissed the action, holding, on the authority of *Leggott* v. *Barrett* (15 Ch. D. 306), that, even if the particulars amounted to a warranty, the contract of sale was merged in and put an end to by the conveyance. The case was argued by most eminent counsel, and is of considerable importance, although not in the authorized reports.

It is submitted that this decision is right, since it would be unreasonable to suppose that the particulars of sale were intended to amount to a warranty which should subsist after completion. It might equally well be argued that the agreement to make a good title, which is always implied in the contract of sale (unless expressly excluded), would subsist after completion.

Where, however, there is an express condition for compensation, it is now established that a purchaser can, even after completion, obtain compensation for a misdescription, *e.g.*, as to the rental or measurement of the property.[1]

(2) If an innocent misrepresentation is made dehors the contract of sale, there is no ground for relief in equity after completion, "either by way of compensation or by setting aside the contract" (see *Brownlie* v. *Campbell*, 5 A. C. 928); nor is there any ground for an action for damages at law unless the representation amounts to a warranty. Thus, in *Brett* v. *Clowser*, (5 C. P. D. 376), where the vendor's agent stated that there was a right-of-way appurtenant to the property, an action by the purchaser after completion was dismissed. On the other hand, a representation by the vendor made at the time of completion may, it seems, amount to a warranty (see *de Lassalle* v. *Guildford* [1901], 2 K. B., at p. 221). A warranty is, however, a collateral undertaking, and therefore comes under the third class into which we have divided our subject.

III.—It is presumed that, as a rule, the preliminary written contract merges in the conveyance in precisely the same way that a parol agreement merges in a written agreement. The rule is, however, stated somewhat too widely in *Leggatt* v. *Barrett* (15 Ch. D. 306) and *Greswolde-Williams* v. *Barnaby* (83 L. T. 708). Where a parol contract is reduced to writing, evidence may be given of a distinct oral agreement

[1] See *Palmer* v. *Johnson* (13 Q. B. D. 351; *Re Turner and Skelton* (13 Ch. D. 130).

upon a matter on which the written contract is silent, and whether the oral agreement precedes or be contemporaneous with the written agreement is of no consequence, provided it be on a distinct collateral matter (see *Lindley* v. *Lacey*, 13 W. R. 80). It is a question of fact whether the parties intended that there should be a distinct parol agreement collateral to the written agreement; and on the same principle, in the case of a conveyance, it is a question whether the parties intended the deed to cover the whole or only a portion of the ground covered by the contract (see *Palmer* v. *Johnson*, at pp. 357 and 359).

As a rule these collateral agreements, which are intended to subsist after completion, relate to something to be done by the vendor after the conveyance is executed, or by the landlord after the lease is taken. The cases of *Morgan* v. *Griffith* (L. R., 6 Exch. 70), and *Erskine* v. *Adeane* (L. R., 8 Ch. 756), were both cases of parol agreements by the landlord to keep down rabbits, in consideration of the tenant accepting the lease and executing the counterpart. In *Angell* v. *Duke* (L. R., 10 Q. B. 174), there was a verbal collateral agreement by the landlord to do certain repairs within a reasonable time after the creation of the tenancy. In *Mann* v. *Nunn* (30 L. T. 526), the landlord entered into a parol agreement to put the premises in such condition as was required by the Metropolitan Building Acts. Four days later a written tenancy agreement was entered into containing an undertaking by the tenant to put up fixtures, but with no mention of the stipulations in the parol agreement. It was held by Coleridge, Brett, and Denman, JJ., that the parol agreement was collateral, and therefore admissible in evidence, but this decision was doubted by Lord Blackburn in *Angell* v. *Duke* (32 L. T. 320).

The decisions in *Morgan* v. *Griffith* and *Angell* v. *Duke*, above referred to, were approved by James, L.J., in *Carter* v. *Salmon* (43 L. T. 492), and by A. L. Smith, M.R., in

de Lassalle v. *Guildford* ([1901], 2 K. B. 223). In the latter decision, the principle of collateral agreements was applied to the case of a warranty by the landlord as to the sanitary condition of the premises, given at the time of completion to induce the tenant to accept the lease, *i.e.*, to an agreement not as to something to be done in the future, but as to an existing fact.

The decisions above referred to were all cases between landlord and tenant; but it is conceived that there is no distinction in principle between the sale of real property and the granting and taking of a lease. A condition as to compensation for misdescription (unless confined to defects pointed out before completion) is, in fact, a collateral agreement which is not embodied in the conveyance, yet subsists after completion. Apart from conditions as to compensation, there are, it is believed, only two decisions as to collateral undertakings by the vendor, viz., the Irish case of *Carrigy* v. *Brock* (Ir. R., 5 C. L. 501), and the recent decision of the Divisional Court in *Saunders* v. *Cockrill* (87 L. T. 30). *Carrigy* v. *Brock* was a case of the sale of leasehold property for the sum of £187, where there was a parol collateral agreement by the vendor to pay the landlord the sum of £50, for the purpose of procuring his assent to the assignment. After completion the purchaser was compelled to pay the sum of £50 to the landlord, and sued the vendor for breach of his collateral agreement. Pigott, C.B., held that the purchaser was entitled to succeed. "Part of the arrangement between the parties was carried out by the deed of assignment, but another part of that arrangement was that the vendor would pay £50 to the landlord for liberty to assign." In that case, which is a very curious one, the licence of the landlord was to be indorsed on the conveyance, and the judgment assumes that "the execution of the assignment by the vendor would necessarily *precede* the giving of the landlord's consent," although one would have expected

exactly the converse to be the case. (Cf. *Ellis* v. *Rogers*, 29 Ch. D. 661.)

In *Saunders* v. *Cockrill*, by a contract entered into on the 24th December, 1897, the plaintiff agreed to purchase a house, and completion was fixed for the 28th of March, 1898. The vendor by the contract of sale agreed to fix certain stoves, drains, &c., and to complete the house in a proper and workmanlike manner. Completion took place on the appointed day, but more than three years afterwards the purchaser brought an action for damages for breach of the contract to complete the house. It was held by Lord Alverstone, C.J., and Darling and Channell, JJ., that the purchaser was entitled to succeed. It seems to have been assumed by the learned judges that the completion of the house in a proper and workmanlike manner by the vendor was not necessarily to be done prior to the conveyance. Channell, J., said "The conveyance is only conclusive in respect of matters to be done prior to the conveyance. All the matters here are quite independent of the conveyance of the property." Lord Alverstone rests his judgment on the ground that the contract to complete the house was "purely collateral."

If, as is usually the case, it is a condition of the contract of sale that the work which the vendor agrees to do shall be carried out prior to completion of the purchase, it is difficult to see how the contract can be collateral or intended to subsist after the conveyance. In that case, the vendor's undertaking is part of the contract of sale, and if the vendor refuses to perform his undertaking, the purchaser can do the work himself, and deduct the expenses from the purchase-money (see *Wells* v. *Maxwell*, 32 Beav. 419-20).

The case of *Piggott* v. *Stratton* (1 D. F. & J. 33), may at first sight appear to fall within the class of collateral agreements by the vendor. In that case a vendor made a representation

that certain property was subject to covenants affecting it permanently in order to induce a purchaser to buy part of the property, and it was held that the misrepresentation amounted to a contract by the vendor that he would not do anything to prevent the property from continuing what he had represented it to be. This decision was considered by the House of Lords in *Spicer* v. *Martin* (14 A. C. 23), and is explained as "a case of bad faith." It would therefore seem to be a case where the fraud of the vendor estopped him from denying the truth of his representation rather than an instance of a collateral undertaking.

The true principle with regard to collateral undertakings by the vendor is, it is submitted, that they must relate to some matter which in the contemplation of the parties need not necessarily precede the conveyance and payment of the purchase-money. The only exception (if it is an exception) to this rule is the case of a warranty given by the vendor at the time of completion, and such a warranty would not, it is presumed, support an action for damages, if the purchaser was already bound by contract to accept the property without obtaining a warranty.

W. ARNOLD JOLLY.

III.—THE REFORM OF LEGAL EDUCATION.

FEW professional subjects attract more notice—few are the basis of more learned articles and speeches, than that of Legal Education. Yet we get no nearer to the establishment of a satisfactory system. Perhaps it is precisely because there are so many counsellors, each with his own *à priori* proposal, that so little progress is made. It may not be without value to examine with some minuteness the conditions of the problem. Let us first take the question of the training of solicitors.

The object is to turn out capable lawyers. But before making good lawyers, you must make—startling as it may sound—good human creatures. It may be assumed that the aspirant will to this end have gone through the ordinary course of school or home tuition, and the only serious question which arises is the necessity or otherwise of university training in general, as distinguished from professional, subjects.

It is difficult to resist the conclusion that a university career postpones to an undesirably late age the entrance of the lawyer into the active work of the world. At eighteen, one ought to be capable, not perhaps of conducting responsible business (though the proposition might be sustained), but of entering into relations with active life. If the mental discipline of ten years' study during the impressionable years preceding that age has not fixed in the character habits of decision, clear thinking and tact, it is not probable that three or four years at college will do it. It is curious what different views are taken of the mental value of a university course. According to one theory, the university man will grasp matters in six months which the outsider has spent three years in painfully getting to understand. On the other hand, there are those who dwell on the proverbial absent-mindedness and unbusinesslike habits of the scholar. These assert that the process of knocking about in the world is a great deal more likely to develop the budding faculties. They say that it is unfair to point to a Cambridge wrangler side by side with a two years' expired articled clerk, and to exclaim how soon the former is on a level with the latter. Of course he is, they answer, because the last-mentioned, after the laudable manner of articled clerks, has since leaving school been engaged in a desultory skirmish with things in general, whilst the former has been working in pursuance of a steady aim. The proper subject for comparison would be an energetic young

business man. It is on no hypothesis of the mental worth of a degree, that the Law Society exempts graduates from two years' articles. At all events, if it does, it must be under an impression which ought to be speedily removed. For it exempts, equally with the wrangler, the idler who has been crammed into a pass degree.

Considering now the wider and less utilitarian aspects of university training, it is necessary to put out of view the degrees of the London and the Royal Universities, as not involving residence. On the whole, college life is not a good school for work. Universal devotion to athletics, the tradition of extravagance and idleness (which is a good deal stronger than many people imagine), and an enervating and depressing climate, make Oxford and Cambridge undesirable places to which to send ex-schoolboys. At the Victoria and Scottish Universities, there is even less supervision and direction of their work,—although there may be a less systematic training in *insouciance*. The university undergraduate, if he is favourably circumstanced, may gain somewhat in general culture. But, after all, it is the home (or the public school) that stamps the seal of cultivation (or the reverse) upon the mind. What the university is likely to do for the average individual, in this respect, is hardly worth the loss of three years.

It is hard to gather what the precise value may be of the Preliminary Examination of the Incorporated Law Society. It does not secure that the candidate for the profession shall be a cultured person—it is impossible that he should be an illiterate one. It either does too little or too much. Most people would be inclined to say that it does too little: and that it would not be amiss to insist on a certain breadth of learning and sympathies in all members of the solicitors' body. Whether examinations are the best method of testing the attainment of such a standard, may be far from certain.

Turning to professional acquirements, these at once divide themselves into practical and theoretical. We may term "practical" those which cannot be imparted by books. There is no real antipathy, or any deeper difference than this, between practice and theory. The present method of giving practical instruction is by requiring the candidate to spend from three to five years in a solicitor's office, and to pass two examinations, of a fairly exacting nature, in the middle and at the end of the course. Of these examinations, the second and most important is virtually in no less a subject than the Laws of England in all their ramifications. The result is, that the student, unless prepared to waste a great deal of time and energy, is driven to seek the guidance of the professed coach. In the majority of cases the articled clerk relies on four months' violent work in London as the principal preparation for the Final examination. Some preliminary reading is no doubt gone through by most—but it is got through in an unsatisfactory way, in evenings or in odd scraps of office time. This leads us to speak of the practical part of the embryo solicitor's instruction—work in a practising solicitor's office.

A solicitor's business is not to teach the theory or the practice of law. The idea of giving systematic instruction to his articled clerks would considerably surprise the average lawyer. There is no obligation on him to give it. He allows the clerk the run of his papers, sets him to copy precedents and to draft conveyances, to write letters and to serve writs, and he takes him in his train to the County Court. Sometimes he may talk to him about points arising out of the duties he has been performing, and these bits of personal intercourse the wise clerk will value. From the senior clerks, too, the latter may get considerable help. But it is all an entirely haphazard affair. It is nobody's business to show the clerk under articles how to turn to account the opportunities he has at hand.

It is needless to point out what a wasteful system this is. To turn a boy from school or college, guiltless of any knowledge of law, into a kind of legal wilderness, and to leave him to make his own paths through it, may be magnificent, but it is not business.

It is sometimes said that the premiums which are charged by solicitors ought to secure that their clerks shall be carefully taught. But this is a fallacy. Teaching, in the strict sense, is not part of the bargain. If the opportunities which an office affords are worth £200, they will remain worth £200 if teaching is afforded as well. And the teaching will have to be charged extra. If it is done by the solicitor, whose business it is not, it will be a great deal more expensive and inefficient than if left to a teacher whose constant work it is. Therefore, the first reform which strikes one as necessary is, that it should be secured that the candidate, before entering on office work at all, should know the elements of law. The multifarious and long-winded *Stephen* is perhaps the very worst book which one would put into a beginner's hands for this purpose. It is the selected work, which forms the subject of the Intermediate Examination. But far better for the purpose would be a group of the best modern text-books, with a book of general jurisprudence to bind them together. Anson on *Contracts* (Stephen dismisses them in one chapter out of four bulky volumes), Edwards or Jenks on *Realty*, Innes' *Introduction to Torts*, and Holland or Pollock's *Jurisprudence*, with Shirley on *Crimes*, and a simple work on Practice would form an adequate course. It might well be supplemented by H. A. Smith's *Equity*—a much more intelligible work than Snell's *Equity*, and more suitable to the tyro. The value of an early introduction to Equity may be questioned. But it is impossible to understand the law of real property without it.

The beginner's notions of law would be much freshened

by such a course being substituted for the monotony of the *Commentaries*. The whole of this reading should be done preparatory to articles. But there are other matters which the student is, at present, left to pick up in the office, and which might with the utmost advantage be taught plainly by a skilled teacher or from books.

We are not depreciating the value of practical instruction, when we insist that a good deal more than is usually thought possible, can be much more economically and quickly given in the form of theory. The purely theoretical course which has been sketched out above will not enable the student to draw a mortgage: it would be a remarkably curious performance that would be put on paper, if he tried to do so. It will not teach him the worthlessness of a good case, unsupported by good evidence; nor the paramount importance of costs. That is no reason, however, for assuming that the thousand and one such matters of practical detail, which the beginner now wastes his time in groping after, cannot be shortly and succinctly taught at the outset. Take a country office where there is not much litigation:—an odd Divisional Court appeal: a Chancery suit or two. The articled clerk is as likely to be misled, as to acquire much real information as to the conduct of business in the Central Office of the Supreme Court. Yet a very fair acquaintance with its working could be given in a few lessons from a capable teacher. The same is true with regard to the drafting of instruments and the use of volumes of precedents. Professional men who are not teachers are apt to assume that their pupils are born with that instinctive knowledge when to diverge from the written word, which they forget came only to themselves as the result of long and assiduous study.

All these matters, and many like them, could be well and cheaply taught to the novice by the study of books if the proper books existed. They would be better though some-

what more expensively taught by professed teachers. As the books do not exist, we must content ourselves with recommending the latter. They are, moreover, absolutely indispensable for the training of advocates.

It might therefore be suggested that the course of pure theory should be followed by a course of theoretical instruction in the methods by which this purely theoretical law is carried out in practice. Eighteen months would not be too short for this, a year being allowed for the earlier course; and fuller study of the pure theory should proceed concurrently. The question arises, by whom can this secondary instruction be given? As we have seen, it is a mistake to look to the office staff for it. Why should it not be the work of the Universities? It may be objected that they are not professional schools. But in one department, at least, they clearly are such—that of physic. University teachers might well undertake this part of the neophyte's education. The only danger would be to guard against its becoming too academic. The abolition of examinations would go far to reduce this danger to a minimum.

College life, however, has its drawbacks. Some of these we indicated at the commencement of this article—another is expense. Even if these objections were removed, it is not a healthy state of things which divorces from localities young citizens at a particularly impressionable period of their lives. It would be undesirable for this reason if it were made obligatory for all legal aspirants to leave their native towns as a necessary condition of advancement in their profession. Every centre of population ought to be provided with an efficient teacher who could undertake the charge of its articled clerks. This instructor should initiate them into those mysteries of unwritten knowledge which link the law of books to the law of daily practice—should teach them the use of their tools—should let the pupils conduct mock sales, and negotiate illusory mortgages, and prosecute imaginary

offences. It is only in this way that a real foundation may be laid on which the solicitor may build.

Lastly, we come to what some may think a tardy recognition of the purely practical part of the solicitor's training. So far from undervaluing this in any way, anyone who has the real interests of the legal profession at heart will see in it the crowning stone of the edifice. It is in order that the candidate may be fully prepared to profit by it, that the institutional and secondary stages will, in any rational scheme, be carefully marked off from it, and devoted to preparation of one kind and another. One and a-half years' articles would be enough for such a fully prepared clerk. His services would indeed be distinctly valuable to the office. He would now acquire that polish and confidence which only comes of actual participation in affairs. This period of apprenticeship should only be entered on after a certificate of competency has been accorded by the professional teacher. Such a certificate might carry the diploma of licentiate in law with it, and regulations might be framed admitting the licentiate to the mastership and doctorate.

It may be thought that in this short survey of the subject the writer has fallen into the pitfall of offering suggestions and recommendations. But it was hardly possible to do otherwise, in the process of laying down the requirements of the situation, if these were to be sufficiently emphasized. Recapitulated, they are comprised in the one word, specialization. An early and systematic devotion to institutional reading—a secondary preparation, equally careful and systematic, in less easily attainable knowledge—a final course of work under a master of his art.

Are there any serious obstacles—details apart—in the way of working out such a system? The premiums now paid to solicitors will continue to be paid, or, at all events, principals will secure pupils who will be a valuable help, instead of a nuisance and a source of danger, in the office.

The coaches will become teachers, and will be engaged by the most wealthy and lavishly inclined districts. The Universities will continue to attract those for whom a degree has its special value. They will even secure a considerable proportion of others, who may see fit to resort to them, instead of to local teachers, for the licentiate's diploma.

There remains the question of the remuneration of the teaching staff. The government stamp of £80 which is impressed on every deed of clerkship, and the fees payable on admittance on the Rolls, might properly be resorted to for this purpose. The public which gets better lawyers ought not to grudge paying for them. But without recurring to this expedient, it is clear that the vast economy of time and energy which would ensue from a proper application of means to ends is worth paying for. A contribution to necessary funds would not form an alarming addition to the expenses which an articled clerk must contemplate.

As to the other branch of the profession, little more need be said. The same danger of too long delaying entrance into active life, the same conflict of opinion as to the value of prolonged academic study, the same obvious incubus of a wasteful and extravagant introduction to practical work, are equally manifest. The sole nominal requirement for call to the Bar (in the way of study) is to pass an easy examination. A practical requirement, for any measure of success, is to read in chambers; and (for the student who wishes to avoid unnecessary trouble) another is attendance at lectures in London.

Here, again, the advantage of securing that the barrister's pupil shall come to him well grounded in the elements of law, and not that only, but also well instructed in the esoteric application of them in practice, must be patent to everyone. The final touches of finish, and the imparting of an acquaintance with the current ways of thought of the

inner circle of the legal world, are the proper work of the practising barrister. It would save his time and temper, and would put the pupil in an infinitely better position for making use of his intercourse with him, if the latter were required to have gone through a course, which need not differ much from that approved for solicitors up to their commencing work in the office. This might be carried out at the university or in the country. If the work of the suggested teachers is properly done—if they conduct mock trials, and constantly exercise their pupils in the details of procedure and affairs, and if they themselves keep in touch with the current of legal opinion, there is no reason why their instruction should not be as effective in the country as in town.

The proper place of a law degree (as distinguished from a professional diploma) in such schemes as would supply the needs here pointed out, is not hard to fix. A law degree implies, as distinguished from a professional diploma, not only a good deal of theory, but a good deal of theory which the graduate will never be called upon to apply in practice. It denotes the attainment of a certain standard of cultured study, and is as suitable to the layman as the lawyer. The fact of having taken a law degree might properly exempt the student from the institutional course and from half the succeeding course, together with the further reading which we indicated should proceed concurrently with it. But it ought to be purely optional.

In our schemes of instruction, lectures would be entirely out of place. It is all-important to remember this, because the ordinary practitioner's idea of legal education means simply more and more lectures. And lectures are nothing but the antiquated survival of a day when books were few, and printing unknown. Even the Mutual Improvement Societies of Cathedral towns are discarding them. As a means of instruction, they are very nearly a waste of time,

and combine the maximum of expense with the minimum of efficiency. The costly personal attendance of the teacher is wasted in delivering words. A printed book would do exactly as much good, to a far wider audience. Genuine intercourse with the pupils would do infinitely more good, though to a narrower circle. Let the practising lawyer understand that the reformers of legal education do not propose to surround the embryo with multitudinous hours of talk. Let it be made clear that the office of the teacher is to economize—that his aim will be to fit the pupil as speedily and soundly as may be for practical work—and we shall be so much nearer the restoration of a sound system of training for the legal profession.

TH. BATY.

IV.—THE INTERNATIONAL STATUS OF MODERN COMPANIES.

THE recent events in South Africa, resulting in the complete overthrow of the Government of the South African Republic, make the present moment a favourable one for considering the legal position which incorporated trading companies occupy in the legal systems of modern civilized States.

In order to elucidate this question it will be necessary to consider, in the first place, the question, What is the position of the trading corporations which derived their incorporation from the authority of that Government?

Some of the companies which worked the Transvaal gold mines were incorporated in England, others in Natal or Cape Colony, but the majority were formed in the Transvaal itself, and incorporated under its laws.

Probably most lawyers would hesitate to say off-hand what became of these companies when the old Government of the South African Republic ceased to exist, and

the territory, which it formerly governed, became completely part of the British dominions.

Did these companies come to an end with the Government that created them?

Did they become, *ipso facto*, companies subject to, and owing their continued existence to the new Government of the country?

Or did they retain the rights and the legal status which had been conferred upon them by the old Government?

It is worth while to consider these questions on principle, although in practice they may not be of great importance; for, by the rule of English law, when any territory, in which a system of civilized law is already established, becomes a British colony, the law then in force continues unchanged, except so far as it deals with the method of Government of the country. And it is presumed that the law relating to ordinary joint stock companies in the Transvaal would therefore remain in force, unless altered by fresh legislation.

But the opportunity is a favourable one for considering the stage of development which has been reached by the law of civilized States generally, in regard to trading corporations: for the cosmopolitan nature of many of the great companies of the present day must, before long, force upon public attention the position which they really occupy.

One of the principal objects aimed at in the formation of a company is that it should be a corporation, that is to say, a legal entity quite distinct from the persons who hold shares in it.

Are these Transvaal companies still corporations?

In order to answer the question, let us consider what the true nature of a corporation is, and what is necessary for its existence. The legal conception of a corporation, as known to modern law, was evolved by the Roman lawyers during the later years of the Republic. In the early times of Rome the only person known to the law was the natural

human being. If individuals joined together for any purpose, the law still regarded them as individuals: and no property could be owned, no civil rights claimed, except by individuals as such.

The first *personæ* consisting of a number of individuals, distinct in the eye of the law from the persons who composed them, were the municipalities.

Originally, in Rome, all public power resided in the State. When a municipality was created, a fraction of the power of the State was delegated to it: there were provisions giving certain rights in the municipality to certain individuals, or classes of individuals, but the State had created a new *persona* in the eye of the law.

The very fact that the object of the new municipality was to exercise functions delegated to it by the State, would suffice to show that the State alone could create such a *persona*. When once created, a municipality was treated by the law as capable of owning property, and possessing other civil rights, just as if it had been an individual.

When the law had once become accustomed to the idea of a *persona*, which was not an individual, it was an easy step for *personæ*, similar in character, to be created for other purposes than that of the government of towns: and so corporations came to be created by the State which were, like the municipalities, *personæ* in the eye of the law, capable of owning property and having certain civil rights, but which were brought into existence for various purposes, such as the management of colleges or hospitals.

Corporations of this kind are to some extent of a public character, but when the notion of a corporate body had become firmly rooted in the law, associations of individuals trading together for their own private profit were simply and naturally created corporations, with the result that the trading was thereafter carried on by the corporation in its corporate name: and the individuals who formerly composed

the trading association now became members of the corporation, which was regarded by the law as entirely distinct from them.

It will be obvious that these were in no sense public bodies; the only persons interested in them were what we should now call the shareholders. But the law always held firmly to the method of creation, which had necessarily existed in the case of municipalities, namely, the express authorisation of the State.

Thus, historically, it would seem true to say that the reason why a corporation cannot spring into existence without the authority of the State was, that the first corporations were bodies to which certain functions of the State were delegated, and this delegation could only be done by the State itself. But however this may be, it is plain that in Roman law no corporation could exist without the express authorisation of the State.

Modern English law follows the Roman law of Corporations in this respect, so far at any rate as corporations aggregate are concerned. Without a charter or an Act of Parliament no corporation, composed of a number of corporators, can exist: for corporations by prescription, as they are termed, are only corporations which are allowed to establish the existence of the charter by which they were incorporated, by means of evidence of long usage alleged to have been under a charter, which the law presumes to have been lost.

During the 18th and the earlier part of the 19th centuries many companies were formed in England for trading purposes, which were not incorporated by the State: these companies, at times, endeavoured to arrogate to themselves the position of corporations; but the endeavour failed, and they were always treated as partnerships, which were not, it is true, dissolved by the death of one of the partners, but which were never recognized as legal entities, distinct

from the persons who were beneficially interested in them.[1]

The first general Companies' Act in England was passed in 1844; but before that date there existed companies which had been incorporated by charter or by special Act of Parliament.

The necessity of incorporation by the State is true also of the laws of modern civilized States generally. A corporation, in order to be recognized by the tribunals of civilized States, must be able to show that it was incorporated by the authority of some sovereign State.

In England the right of a corporation created by a foreign State to sue in the courts of law was established as long ago as 1730; and, at the present day, a corporation which can show that it could sue in the courts of the country from which it derived its incorporation, is entitled to sue in the courts of any other civilized country.

But the mere fact of a corporation having been validly incorporated by a State is not conclusive to show that it is still validly existing in the eye of the law: it is, of course everyday experience for an incorporated company to be dissolved, and the legal entity which it constituted to cease to exist.

What, then, of a foreign corporation which derived its origin from a State which has since ceased to exist?

If we bear in mind the origin of corporations in Roman law, we can easily see that there is a clear distinction between corporations, such as municipalities which exercise functions delegated to them by the State, and trading companies which carry on business just in the same way as individuals might do.

With regard to corporations which exist as delegates of the powers of the State, it is not easy to see how these can survive the Government which created them; they really

[1] See *Baird's Case* (5 L. R., Ch. 725).

formed part of that Government, and were bound up in its existence.

And in the case of territory, with a fixed system of law, becoming a British colony, it may be supposed that the old local governments would cease to exist, equally with the old central government.

But corporations which, when formed, have no greater power, and act in no other way than ordinary individuals, are in a different position: and it is with corporations of this kind that we have to do.

It is commonly said of corporations that they are immortal, but this means no more than that they do not die the common death of all men: corporations, as already pointed out, are wound up and dissolved every day.

But is there anything in the nature of a trading company which connects it indissolubly with the Government from which it derived incorporation?

It is clear that an incorporated company may carry on business in countries other than that in which it was incorporated; and that, under the present English company laws, a company may be validly incorporated in England which is never intended to carry on business in England at all, but only in foreign countries.[1] Or a company may remove its business altogether from one country to another, without losing its original corporate character *ipso facto*.

No doubt, in some countries, of which the South African Republic was one, some form of registration is required, in order to enable a foreign corporation to own property or carry on business, but this does not in any way alter the character of the company, whose right to be regarded as a legal entity depends still on its original incorporation.

Further, it would seem to be clear that a company incor porated abroad, which transferred the whole of its business

[1] See the question discussed in the case of *Princess of Reuss* v. *Bos* (L. R., 5 H. L. 176).

and assets to England, could be wound up and dissolved by the authority of the English Courts.[1]

These considerations serve to show how slight is the tie by which a trading corporation is bound to the State, from which it derived incorporation.

The real fact is, that for some time, and during the last fifty years in particular, the international position of trading corporations has been gradually evolved, without any great attention being paid to the logical consequences which would flow from the decision of each particular question as it arose: with the result that, at the present day, a trading corporation, once validly incorporated by a civilized State, becomes throughout the world a legal entity, capable of carrying on business and owning property anywhere (subject, of course, to the restrictions imposed by particular States within their own territory, which apply also to individuals), and of moving about from country to country just as an individual might do. Of course the continued existence of a corporation must depend upon its charter of incorporation to this extent, that if its duration is limited at its inception, or if provision is made for its dissolution in any particular way, then it will continue to be subject to these limitations; but, except to this extent, it is launched in the world with full legal rights and capacities.

The conclusion, then, in regard to the position of the Transvaal companies is that they remain corporations, unaffected by the overthrow of the late Transvaal Government, and that this would be so, even if the law in force in the new colony were English, instead of being the old law of the country.

But the real importance of the principles which it is sought to establish in this article is, as already pointed out, not in their application to the Transvaal companies.

One of the most striking features of modern commerce is

[1] *In re Matheson Brothers* (L. R., 27 Ch. D. 225).

the formation of gigantic trading corporations, and the existence of these corporations as legal entities, recognized by the law throughout the civilized world as such, is calculated to give rise to problems of great difficulty: and the Governments of civilized States would do well to recognize, and make provision for the regulation of these world-wide trading bodies, which occupy the same place in the eye of the law as individual human beings, without the natural infirmities of the latter, and are capable of attaining to a measure of power, which might easily overshadow that of the Governments themselves.

D. F. PENNANT.

V.—BRITISH PRIZE LAW.

IT is curious that a nation which has taken the leading part in maritime warfare for the last four centuries at least should still be without a permanent official code of the Prize law administered by its courts, and that the principles upon which their prize jurisdiction is exercised have to be sought from the course of policy adopted by the Executive at a particular time, or from decisions of the Prize Court, *nominatim*, such as the Swedish convoy case or the rule of the war of 1756. The present Admiralty Manual of Prize Law (Edition 1888) can hardly claim to possess official authority since its non-recognition in the recent *Bundesrath* and *Herzog* Cases; and the proposed new Prize Act, like its predecessor, only deals with the municipal side of the question, the jurisdiction and procedure. An opportunity is now afforded, by the appointment of a Committee by the Foreign Office, to discuss the compilation of a digest of the leading prize cases for the use of Colonial Prize Courts, and the instructions to be issued to naval officers on questions of Prize law, to give effect to the suggestion

made by Professor Holland (*Times*, April, 1901), that our Government should follow the example of the United States in framing an official code of Naval law in War. When it is remembered that almost all our precedents and rules date from the times of the Napoleonic wars, that none of our prize decisions are subsequent to the Declaration of Paris of 1856, and that they take no account of the new conceptions and applications of International law as regards belligerents and neutrals, due as much to international treaties and scientific discussions by international lawyers during the last few years, as to the practical experiences furnished by the most recent wars, the present state of things hardly seems satisfactory. Although the principles of the Law of Nations are permanent and immutable, it is obvious that the method of their application must be adjusted from time to time to the ideas and relations actually prevailing between nations, if the Law of Nations is to have any influence on international politics and morals at all. The merit of the United States Naval Code is, that it draws upon all these sources of scientific as well as practical experience alike, in order to bring itself thoroughly up to date, subject, however, to the limitations imposed by existing international practice. For example, it retains the right to make prize of private property at sea: although the traditional policy of the United States has been to endeavour to obtain recognition for the principle of immunity of all private property at sea from capture, except in cases of contraband and blockade. But one great reform which the United States have made in their Prize law does not appear in their code, viz., the abolition of the right of captors to prize and prize money at sea, effected by act of Congress in 1898. Logically, the idea of allowing private gain to be made in war seems only consistent with allowing the private individual to carry on hostilities on his own account; and the system of the captors taking the benefit of their prizes

might properly have been abolished with the renunciation of privateering made in the Declaration of Paris. Whether the action of Great Britain in becoming a party to that Declaration was well advised or even theoretically sound has been doubted. Analogy from the favour now shown in land warfare to the equivalent of the privateer at sea, the guerilla or *levée en masse* of the population of an unoccupied country as recognised belligerents, gives room for doubt whether warfare ought to be regarded as only the affair of regular State forces. For a nation now owning three-quarters of the mercantile marine of the world it might have been safer to adopt the American proposal to abolish the right of capturing private property at sea simultaneously with abolishing the right of private individuals to take part in war. Historically, however, our system of Prize law has advanced from being a system of private hostilities and private gains in war to a system of warfare by the regular forces of the State only, and for the benefit of the State only; and Great Britain ought not to be behind its daughter State in recognising this fact.

Expressions have been used by great judges and jurists to the effect that the prize jurisdiction of the Admiralty Court was not older in date than the end of the 17th century, and was not inherent but was given by warrant specially from the Crown, and that such courts are municipal only and not international really; which seem to imply that the conception of courts administering International law is modern and theoretical only. These are not in accordance with the historical development of the law of prize which has been placed recently in a clearer historical light by the publication of the early records of the Court of Admiralty.[1] These show that, before the 14th century,

[1] *Select Pleas in the Court of Admiralty*, 1390—1404; 1527—1545; 1547—1602. Two volumes, edited by Mr. R. G. Marsden, issued by the Selden Society. London: 1892 and 1897. See also a paper by the same author: *The High Court of Admiralty in relation to National History. Commerce & the Colonisation of America*, A.D. 1550—1650. 1902.

the making prize or taking of foreign ships and goods by private persons was the rule and not the exception; that this was of frequent occurrence in time of peace; and that such actions were regarded as governed by the same principles of law as the seizure of British ships by British subjects, and fell within the jurisdiction of the ordinary courts. The prototype of the prize cause was the *causa spolii*, or spoil cause, a civil proceeding as opposed to a piracy or criminal cause, generally brought by the former owner of the property captured to recover it from the captor, resulting in a sentence *absolutoria* in favour of the possessor, or *condemnatoria* for restitution or payment of the value of the *res*. Piracy and spoil were adjudicated upon by the courts of Common law, the Chancellor, or the King's Council; and issues were sometimes directed out of Chancery to the King's Bench and tried by juries, either of the county next to which the spoil was committed, or of the county from which the spoilers came, or to which the spoil was brought, these juries being either ordinary ones or composed of "merchants and mariners," and the trial being had "*secundum legem et consuetudinem regni Angliæ*," or "*secundum legem mercatoriam*" or "*maritimam*." The foreigners, however, who had been "spoiled" by English subjects, were not satisfied with the Common law courts or the law which they administered, and complained that they did not receive justice there, and similar counter-charges were made by English subjects against French and other foreign courts. Treaties were made between England, and France, Flanders and Spain, at different times, for the settlement of piracy claims, with special directions as to the law to be applied, the procedure, and character of proofs; but Edward III finding that complaints by foreigners still continued, and that he had to compensate his allies for the depredations of his subjects, established the Court of the Admiral as a special court for the trial of these claims

according to the Civil law. Proceedings in the Admiralty Court are first mentioned in 1357, when Edward III wrote, in answer to a claim by the King of Portugal for goods belonging to Portuguese taken at sea by English subjects from a French ship which had previously spoiled a Portuguese ship, that the goods had been declared by the Admiral before whom the Portuguese had sued for restitution, to belong to the English ship as good prize; and in 1354 the statute 27 Edw. III declared that foreign merchants were to have restitution of their spoiled goods without suit at Common law. In 1509—1519 Henry VIII made treaties with France for the trial of piracy causes, by which special courts were established for each country, that for England consisting of the Admiral, the Master of the Rolls, and the Judge of the Admiralty, the latter trying spoil cases under a special commission according to the treaty, applying a specified law and procedure. The Admiralty Court continued to try such cases during the 16th and 17th centuries, without special commission, by virtue of its inherent authority: and in Elizabeth's time letters of reprisal were only authorized to be issued by the Council to claimants who had proved their loss in the Admiralty Court, or before Commissioners, and formal condemnations of prize began after that in 1585. The Admiralty prize jurisdiction was not definitely distinguished from the instance jurisdiction till after the middle of the 17th century. The separate prize records began about 1625, but it was not till 1781 that its jurisdiction was recognised as exclusive by the Common law courts (*Lindo* v. *Rodney*; *Le Caux* v. *Eden*, 1 Dougl. 594, 612). It is true that prize jurisdiction has been granted by royal commission and regulated by statute since 1740; but by historical precedent the Admiralty Court had already acquired what was practically an inherent authority of its own in prize. In Lord Stowell's words, "It is a common practice of European States in every

war to issue proclamations and edicts on the subject of prize; but till they appear Courts of Admiralty have a law and usage on which they proceed, from ancient habit and practice, as regularly as they afterwards conform to the express regulations of their prize Acts" (*The Santa Cruz*, 1 C. Rob. 63).

These records show not only the development but also the antiquity of the principles of Prize law, for which a few examples are enough. Thus, in 1349, the Common law courts decided that property in goods recaptured at sea from the enemy revert to the original owner: and in 1353, goods recaptured from pirates were ordered after the trial by the Admiral and Council to be restored, because by the law maritime the ownership of goods taken by pirates is not divested unless they remain in the pirates' possession for a night. Salvage was granted by the Admiralty Court for recaptures from enemies and pirates in 1533, 1553, and 1573. In 1560 the French ordinance of 1543 declaring that "if enemy's goods are found on board a friendly ship, or friends' goods on board an enemy's ship, the whole (goods) may be declared good prize," was followed by the English Admiralty in 1595 and 1598, and freight was given to the friend in the former case (see Phillimore, *International Law*, iii, 310). Instances of "joint capture" occurred in 1555, when it was declared that "any ships in pursuit of another ship of the enemy at the same time shall be entitled to share in the prize whichever takes it," and so in 1600; as also of the right of search, which was not allowed in one instance certainly where the ship was under convoy. In the war with Scotland and France in 1544, and that with France in 1547, English subjects were authorized to capture ships and goods of the enemy and keep them, without accounting therefor in the Admiralty Court and without rendering the Admiral his share; but he generally took a tenth as his share of prize, which the shipowner was bound by recognizances

to pay, and in 1560 he was granted one-third. In this connection it will be remembered that the relative rights of the Crown and the Admiral to prize were fixed by Order in Council in 1665 (*The Rebekah* [1799], 1 C. Rob. 227): but in William and Mary's reign the Admiral (Prince George of Denmark) consented to forego his right to prize droits for a fixed yearly sum (£7,000), and when the office was put into commission the commissioners received the same sum for their salary, and the Crown took the benefit of prize droits and Admiralty droits alike. A proclamation of 4 & 5 William and Mary gave privateers four-fifths of the cargo and the whole of the ship, while King's ships took the ship and one-third of the cargo: another proclamation of 1702 gave King's ships half, and privateers the whole of the prize; and in 6 Anne captors generally were given the whole benefit of the prize, an arrangement which has continued ever since; the Crown, however, having always an absolute discretion whether it will award any prize at all, and having the power to release the prize before adjudication. (*The Elsebe* [1802], 5 C. Rob. 174.)

It is a commonplace that our Prize law owes an immense debt to Lord Stowell's decisions in the Napoleonic wars, which have been described as models of judicial eloquence, and are luminous expositions and applications of its principles; but, historically, its foundations and outlines had been traced long before his time. In such decisions of his as *The Elsebe* (absolute discretion of the Crown over prize), *The Hoop* (illegality of trading with the enemy), *The Santa Cruz* (right to salvage on recapture of allied property from the enemy), *The Young Jacob & Johanna* (liability of coast fishing boats to capture), and *The Waaksamheid* (principle of joint capture), Lord Stowell cited and applied already recognised rules of Prize law, illustrating and expounding them by comparison of the views of jurists like Bynkershoek and the practices of other nations, and adapting their application

to the circumstances of the particular war with which he was concerned. The very weight of his decisions has, moreover, made British lawyers inclined to give to rulings of his, in particular cases of peculiar circumstances, a general application which later consideration has not approved, and which probably he himself did not contemplate, as appropriate. An example of this is to be found in the rule of "continuous voyages" with reference to contraband, on which the instruction contained in the present Admiralty Manual is as follows: "The destination of the vessel is conclusive as to the destination of the goods on board. If, therefore, the destination of the vessel be neutral, then the destination of the goods should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination to be attained by transhipment, overland conveyance, or otherwise." The authorities cited for this (*The Richmond*, 5 C. Rob. 525; *The Lisette*, 6 C. Rob. 385; *The Trende Sostre*, *ibid.* 390) do not lay down the general proposition: and the reasoning seems quite consistent with the view enunciated by the United States Supreme Court in *The Bermuda*, *The Springbok*, and *The Peterhoff;* by a French prize court in the Crimean war; by the Italian prize court in the war between Italy and Abyssinia in 1896; and by our own Government in the recent South African war, viz., that if contraband goods are destined for the enemy, and in order to reach him they go by the medium of a neutral port and thence whether by land or water transport, they can be seized and confiscated. In *Hobbs* v. *Henning* (17 C. B. N. S. 791), it is true that a Common law court, relying on the expression of Lord Stowell in *The Imina* (3 C. Rob. 128), that "Contraband must be taken *in delicto, i. e.* in actual prosecution of a voyage to an enemy port," held that goods going from one neutral port to another could not be contraband whatever their description; but other expressions of the

learned judge in the same case clearly point to the real destination being the decisive test of their contraband character; and, in a case where the question was whether the claimant was trading with the enemy, he held that the fact of a neutral destination, if there is an ulterior purpose of sending the goods to an enemy port, did not prevent their confiscation if English goods (*The Jonge Pieter*, 4 C. Rob. 79). His judgments have a higher right to rank as authorities in our Prize courts, for the spirit of international equity in which they re-state principles of International law in accordance with the progress of modern ideas.

Although our Prize law and that of the United States are in most points in accord, the United States' Naval Code differs in several noteworthy respects from the law laid down by our courts, and in some cases from their own. It is unnecessary to do more than mention the changes introduced in the laws of war by recent international conventions from motives of humanity, such as the prohibitions against the use of projectiles or explosives thrown from balloons or in a like manner, due to the adhesion of the United States to the Hague Declaration (agreed to by certain nations only), with regard to forbidden methods of warfare: or its adoption of the proposed (but not ratified) Article 10 of the Hague Convention applying the Geneva Convention to naval warfare, providing for the medical attendance and internment of shipwrecked persons, wounded or ill, who are disembarked in a neutral port by consent of the local authority, at the expense of the State to which they belong.

In other points dealing with the conduct of war which, though not hitherto accepted, probably would be recognised as rules of International law, such as the protection of submarine cables, except those connecting the enemy country with a neutral one to the extent of the territorial waters of the former, or connecting the home country with a

neutral one which are subject to the necessities of war, and the protection of undefended coast towns from bombardment, a British naval war code would probably follow the American one. In one provision indeed of the latter, namely, the explicit allowance of reprisals for acts not justified by the laws of war, it would perhaps seem better to ignore the possibility of the occurrence of such acts, and leave the way of meeting them to general principles. Other changes are really rules of practice adopted as principles: such as the exemption from capture as of right of merchant vessels found in United States' ports at the outbreak of hostilities for a period sufficient to enable them to clear out. This only reproduces the language of the British proclamation at the beginning of the Crimean war in 1854: but our courts have been careful to recognise the right of the Executive to seize enemy property found within its jurisdiction at the outbreak of war, though no such instance has occurred for the past century and more (*The Johanna Emilie*, Spinks, 14): and it is hardly in accordance with the spirit of our early statute law (see *Wolff* v. *Oxholm*, 6 M. & S. 92). The United States' Supreme Court has similarly held (*dissentiente* Story J.) that, although its Executive internationally possesses this power, constitutionally the authority of Congress is required (*The Emulous* [1812], 1 Gallison 563). A similar reform is the exemption as of right from seizure or detention, unless there are clear grounds for suspecting violation of the laws of war with regard to contraband, blockade or neutrality, of neutral mail steamers, even though carrying in a regular and ordinary service enemy despatches. This again is only in accordance with our own practice in the South African war, when Lord Salisbury, after the difficulties caused by the detention of the German ships, consented that no more mail ships should be searched on mere suspicion, and that the right of search should be restricted to a certain distance

from the area of hostilities. In the Franco-German war of 1871, and in the American Civil war, a similar immunity was accorded.

Other provisions of the American Code must, however, be regarded as conflicting with our hitherto accepted ideas: for example, the exemption as of right from capture of enemy coast fishing vessels innocently plying their trade, and the immunity as of right from search of neutral vessels under convoy of a man-of-war belonging to their country. The former provision embodies the view expressed by the United States' Supreme Court in *The Paquete Habana* (175 U. S. 354), and the general practice of Great Britain and France till the end of the eighteenth century, as also the practice of Great Britain in 1806. The United States in the Mexican war, and France in its last wars with Russia, Austria, and Germany, similarly prohibited the capture of such vessels except for military or naval reasons. Lord Stowell, however, justified the application to them of the general right to capture enemy property at sea in 1800 (*The Young Jacob & Johanna*), under the instructions issued by the British Government to seize French fishing boats because they were being used for military purposes, on the ground that the English practice in former wars was a rule of comity and not of legal decision, and being a relaxation of strict right made for humane reasons could be revoked for sufficient reasons of war. It would seem more in accordance with present ideas to restore the general rule of their immunity (which dates back in France so far as 1453) subject to military considerations, now judicially and executively established as a right in the United States: and this rule is one which probably every Government would adopt at the present day (Hall, *Int. Law*, 467, 469).

The second proposition is in accordance with the policy constantly advocated by the United States Executive, and

expressed in numerous treaties between their country and others, chiefly South American States; but it is admittedly a departure from their prize decisions, which agree with ours in holding that the mere act of sailing under convoy is *per se* inconsistent with neutrality as a premeditated attempt to oppose, if practicable, the right of search, and has the effect of actual resistance to search (*The Nereide*, 9 Cranch, 440; *The Maria* [1799], 1 C. Rob. 340). It is common knowledge that the Armed Neutrality endeavoured to get this principle recognised as a rule of International law, and that Great Britain has always resisted it except during 1801 and 1802, when by agreement with the Baltic Powers she limited her right of search to cases of suspicion and then under specified conditions; but the later treaties of 1812 and 1814 did not repeat this concession. It is, however, the fact that at the present day, besides the Baltic States, France, Germany, Austria, Spain and Italy adopt this view; it is maintained by Continental jurists to be a rule of International law; and the Institute of International Law has followed suit in its *projêt* of Prize law: although English lawyers upheld the British view, not only as a matter of principle but also of policy under probable conditions of modern warfare (Hall, 753). Neutral rights have now been recognised as having a far wider scope than they had in the days of Lord Stowell; and it may not be necessary to continue our solitary adherence to a belligerent right the assertion of which was required by a period of great pressure, when the field of war was more extensive than is perhaps ever likely to exist again in international relations. It is also to be noticed that the method of visit authorised by the code now under consideration, namely, of the belligerent officer visiting the neutral ship, instead of the neutral master being summoned on board the belligerent ship which had some modern usage in its favour (*The Eleanor*, 2 Wheaton, 262), and seems to be the rule in the German and Danish

navies, follows the regular British and American practice, which has received the approval of the Institute in its *projêt* (*Annuaire*, 1883, p. 214).

Another point in these Instructions which deserves notice is their definition of provisions as contraband only "when actually destined for the military or naval forces of the enemy," adopting the judicial definition by Story J., in *The Commercen* (1 Wheaton, 382). This seems more correct than the wider language of our Admiralty Manual "Provisions fit for the consumption of the army or navy." (Gover, *Journal of Comparative Legislation. Comparative views of Contraband*, Vol. 1, N. S., 126), and more in accordance with the decisions of Lord Stowell, cited in that Manual as its authorities (*The Jonge Margaretha*, 6 C. Rob. 191; *The Haabet*, 2 *ibid.* 174; *The Edward*, 4 *ibid.* 68; *The Ranger*, 6 *ibid.* 125), and with the reasoning of the British protest in 1885 against the French Government's announcement, that they would treat all rice destined to any port North of Canton as contraband, on the ground of the pressure this would put upon the Chinese population generally, a ground which our Government has never put forward since it did so in 1793 and 1795 against France. Hall emphasizes the necessity of the destination in such a case being solely and actually the military or naval forces of the enemy, by declaring that the "detention of provisions bound even for a port of naval equipment is unauthorised by usage and unjustifiable in theory" (p. 689). In this connection the provision in our own Prize Act (Prize Bill 1902, s. 34), giving the Admiralty the right of pre-emption of naval and victualling stores laden on board a foreign ship passing the seas, and intended to be carried to a port of the United Kingdom without having them condemned in a prize court, has been recently criticised (R. G. Marsden, *Journal of Comparative Legislation*, 1902, i, 45) as unnecessary, having been originally passed in 1746, in order to get round the prohibition in the Navigation Act,

against importing goods, of foreign growth or origin in foreign ships not belonging to the same country as that producing the goods, and also as inconsistent with our present accepted view that provisions are not (except as in the case above) contraband. This assumes that pre-emption is only applicable to contraband articles, generally those contingently so; and the British and American view of pre-emption, no doubt, is that it is a "mitigation of the belligerent right" of confiscation; "a compromise between the belligerent's right founded on self-defence and the claims of the neutral to export his commodities though incidentally contributing to purposes of hostility" (Lord Stowell, *The Haabet, ante: The Sarah Christina* [1799], 1 C. Rob. 242). The American code seems to adopt this view, by not mentioning any liability of neutral property to be brought in for pre-emption or to be detained or seized for any other purposes than those mentioned; though Continental jurists have treated it as an additional belligerent right (Hall, 691): and a prize code of ours would probably say nothing of pre-emption, treating it as a matter for the Executive. With regard to blockade the code follows on the previous lines of British and American practice, without taking account of some of the recent decisions of the Supreme Court in prize cases arising out of the war with Spain. In the *Adula* (176 U. S. 361), that court held, in accordance with our law, that a blockade may be established by a naval commander without express authority from the Executive, and that knowledge of such a blockade is equivalent to formal notice of a blockade *de jure* with all formalities; but went beyond it in the same case in holding that sailing from a neutral port for a port where a *de facto* blockade exists subjects a neutral ship to forfeiture, although there is no actual intent to run the blockade, and at the time of capture the actual port of destination had been for some time in possession of the captor's forces.[1] It is true that the Supreme Court, in a

[1] See paper by E. P. Wheeler, *Int. Law Ass.*, *Rouen Report*, 1900.

case during the Civil war, similarly held that the fact of the destination having ceased to be hostile, did not affect the guilt of the ship sailing for it in ignorance of that change of character (*The Circassian*, 2 Wall, 135, 151): but this is opposed to the view of Marshall, C. J. (*Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch, 195), and did not commend itself to the joint commission appointed by the American and British Governments to consider claims for compensation in that war, who gave damages to the particular neutral ship. It is also contrary to the view of Lord Stowell, that in cases of blockade and contraband the *delictum* depends on the character of the destination (*The Lisette, ante; The Trende Sostre, ante*); though in cases of trading with the enemy the same learned judge held, contrary to what would probably be the present opinion, that property originally hostile cannot change its character *in transitu*, although its owner becomes a British subject between the time of sailing and capture (*The Abby*, 5 C. Rob. 1; *The Danckebaar Africaan*, [1798], 1 C. Rob. 107). The United States Instructions, conformably with the treaties negotiated by their Government (Hall, 723), allow neutral ships to sail for a blockaded port with an alternative destination, the choice to be determined upon information to be obtained at an intermediate port, as to whether the blockade continues, just as our law does (*Naylor* v. *Taylor* [1829], 4 M. & R. 531); and they adopt our rule as to the effect of the destination becoming friendly. In this connection may also be noticed the same court's decision, that an effective blockade can be maintained by a single ship, if by her speed, armament and equipment, she can keep efficient watch over the entrances to the port (*The Olinde Rodriguez*, 174 U. S. 510, like our *The Franciska*, Spinks, 115),—a change from the time when treaties used to stipulate that the presence of more than one ship should be necessary for a blockade, *e. g.*, France and Denmark in 1742, Holland and the Sicilies in 1753, and

Russia and Denmark in 1818 (Hall, 729). The requirement of certain Continental nations, that each individual neutral ship approaching the blockaded port must be notified before she can be fixed with knowledge of the blockade, *e.g.*, France, Spain, Sweden, and Italy; but not Germany or Denmark, is one that is not more likely in the future than in the past to stand the test of practice (Hall, 721).

It is true, as Professor Holland has pointed out, that the United States Code deals simultaneously with two questions really distinct, namely, hostilities against enemy forces, and the principles applicable to capture of merchant ships generally neutral property; but it is difficult to see how this could be otherwise, both being branches of the belligerent duties of naval officers, and the fact that the former probably falls within the province of articles or regulations of war, does not make it inappropriate to include them in a statement by the United States Government of its conceptions of its international rights and duties in maritime war. There are, however, two points, if not more, of recent interest in International Prize law, on which it is to be hoped that a similar future Naval Code will be enabled by international agreement to speak more consonantly with the modern current of opinion than the United States Code. These are the extent of territorial waters, and the conditions of exercising the right of detaining vessels visited and searched. The conventional limit of three miles for territorial or marginal waters, based on the supposed range of a gun in position, has long been recognized as inadequate to satisfy the only reasonable, if any, motive for fixing that limit to territorial sovereignty at sea, namely, the safety of the State; and representative bodies of jurists have recommended that a distance of six marine miles from low water-mark should be considered territorial for all purposes, while in time of war a neutral State should be able to extend this by declaration,

for all purposes of neutrality, to the extreme range of cannon from the shore. For revenue purposes a limit of four leagues has been taken in customs jurisdiction by Great Britain and the United States. Another advantage of a wider margin of territorial waters would be, that it would tend to their greater inviolability in war or peace, and to minimise the likelihood of the neutral State taking steps to punish outside its territorial waters belligerents committing hostile acts within them. That the first is an offence against the Law of Nations is recognised by old and modern authority, though in some of Lord Stowell's decisions there are expressions of opinion implying that belligerents may pass through territorial waters for hostile purposes to be effected outside them, and, as against the other belligerent, though not as against the neutral power, may even effect hostile purposes within them (*The Twee Gebroeders*, 3 C. Rob. 373; *The Vrow Anna Catharina*, 5 C. Rob. 15; *The Anna, ibid.* 373): and the United States Code similarly forbids any belligerent act in neutral waters. The second offence is a more doubtful one, and the United States Courts have held (formerly) that foreign ships, which have offended against the United States law within their jurisdiction, may be pursued and seized upon the high seas and brought into the United States for adjudication, and that seizures beyond the limits of territorial jurisdiction are warranted by the Law of Nations (*Church* v. *Hubbard*, [1804], 2 Cranch, 187; *Rose* v. *Himely*, 4 *ibid.* 241; *Hudson* v. *Guestier*, 6 *ibid.* 282; *The Mariana Flora*, 1 Wheaton, 42). American jurists, however, admit that this is not allowed by international agreement (Taylor, 248); and the United States Government must be taken to have acquiesced in this view in the recent dispute between themselves and Russia over the seizure by a Russian cruiser of American ships in Behring Sea, outside territorial waters, after chasing them while unlawfully fishing within those waters,

by stating that it claimed no jurisdiction beyond territorial waters, and by accepting the decision of the arbitrator, which negatives the Russian contention that this course was justifiable, and holds that a State's jurisdiction only extends to territorial waters.

The conditions of the right of detaining neutral ships, which were brought to public notice by the detention of the German mail ships in the recent war, hardly seem clearly or concisely enough stated either in the United States Code or in our Admiralty Manual. By the former, neutral ships can only be detained if the ship's papers show contraband on board, or in the case of violation of blockade, or of the ship being in the service of the enemy, or if suspicious circumstances justify a fresh search. By the latter, detention is only allowed for resistance to search, sailing under hostile convoy, and deficiency of papers: and also upon suspicion arising on the visit and search based on proper evidence against the ship, amounting to probable cause for her detention; such evidence being facts appearing by the inspection of the ship, her character, equipment, cargo, and crew, and papers, and the circumstances connected with the ship and cargo, being such as to give reasonable ground for the belief that they may turn out to be lawful prize; the penalty for improper detention being the payment by the captain of the visiting ship of damages and costs. The meaning of both seems to be that suspicion to justify detention must be founded on something discovered at the time of visit, and not merely conceived previously to the visit. Count von Bulow, on the occasion of the British detention of the German mail ships, stated that, according to the German legal and naval authorities, "the right of visitation might be divided according to circumstances into two or three acts—stopping the ship, examining the papers, searching the ship. The first two of these acts could be carried out at any time without further ado: if they offered

ground for suspicion the ship may be searched; if the neutral vessel has offered resistance while being stopped, or if an examination of its papers reveals irregularities, or if contraband is discovered on board, the belligerent ship of war may take the neutral ship into port, in order that the matter may be examined and decided by a competent Prize Court." This seems to be what we should recognise as a correct and concise expression of the law, especially when it is considered that prizes can only be condemned out of their own mouths in the first instance, the primary evidence in prize causes being the ship's papers and testimony of the crew.

This attempt to compare together the systems of Prize law prevailing in Great Britain and the United States has, it is hoped, been enough to show how few real differences exist between them. Between two kindred nations, parted from each other little more than a century ago, this is not surprising: but it only requires a similar comparison of the Prize laws of other nations to see how by slight mutual concessions an international code of Prize law could be framed. There is nothing inherently impossible in the idea of general international agreement on the main principles of this law, and in the actual realisation of the ideal which Lord Stowell set before himself in the well-known judgment in *The Maria*, that a Prize court sitting in England should administer the Law of Nations in exactly the same way as if it were a court sitting in Stockholm, without regard to considerations of national interest or political circumstances; that it should "assert no pretensions on the part of Great Britain which would not be allowed to Sweden under the same circumstances, and should impose no duties on Sweden as a neutral country which would not be admitted to belong to Great Britain in the same character" (1 C. Rob. 350). It does not seem an idle hope to imagine the Hague tribunal as the court of final appeal, whose judgment should

guide the national Prize courts in their decisions, if not itself acting as a court of first instance in prize questions; and it will be an encouraging omen if in the present Venezuelan difficulty the Governments concerned are willing to submit to the judgment of that court their causes of difference, even after acts of actual hostility have taken place.

G. G. PHILLIMORE.

VI.—THE CRIMINAL RESPONSIBILITY OF THE INSANE.

(*Continued from page* 85.)

III.—THE UTILITY OF THE RULES LAID DOWN IN MACNAUGHTEN'S CASE.

Assuming the present test of criminal responsibility to be what for purposes of brevity may be described as the "right and wrong" test, it remains for us to discuss the precise meaning which has been attached to this phrase, and to consider *how* it meets the problems of insanity with which the judicature is from time to time confronted. It will be convenient to recall our former classification in considering these medical and legal controversies. As, however, it is doubtful whether English law recognizes insanity without delusion (except in cases of total want of mental power, *e.g.*, idiocy), our primary consideration had better refer to insanity involving some definite intellectual disorder, whether this disorder is attended by a condition of mania or melancholia, or by any disease, such as epilepsy, which tends to disturb the emotions and faculty of volition.

(i) *Intellectual Insanity* (*Chronic*). Characteristic: Delusion.

Although the classification here adopted can put in no claim to scientific accuracy, since those perversions of the

intellect, here roughly termed insanity with delusion, are found frequently accompanied by violent morbid impulses and by more or less moral alienation—conditions treated of under our second heading—yet it is convenient to discuss under this heading the theory of partial insanity (sometimes called monomania) as understood by lawyers. Before doing so it is necessary to define what is meant by delusion. A delusion[1] may be described as a false belief respecting existing facts.

Although the authority of the Judges' Answers has been disputed in some quarters, yet they still remain the only statement that we have of the law as to criminal responsibility with reference to the insane, and in the majority of cases they have been accepted and acted upon by judges. It is scarcely possible to determine absolutely whether these answers were intended to be exhaustive; but at any rate it is certain that they concern themselves with cases of delusional insanity only; and since delusion was held to be the true test of insanity, not only by laymen, but by many doctors at the time when they were framed,[2] it is highly probable that they did not contemplate the possibility of cases of insanity unmarked by delusion.

This theory of "partial insanity," which was first seriously recognised in *MacNaughten's Case*,[3] as formulated by medical writers, amounts to this—the existence of a mental condition in which the mind is certainly unsound on one or two subjects, though the unsoundness does not manifest itself upon the generality of matters.

1 "A fanatic," says Whateley, "is the subject of strong delusions, while the term illusion is applied solely to the visions of an uncontrolled imagination or to spectral and other ocular deceptions to which the word delusion is never applied." This, however, rather confuses illusion with hallucination, an illusion, in the language of medical men, implying a merely distorted conception of the senses of some objective reality; whereas an hallucination is a false perception of the senses, there being no objective reality.

2 *Vide* Pinel in his earlier researches.

3 Hale was the first English writer to attempt to distinguish between partial and total insanity.

This phrase "partial insanity," however, the present writer considers an ill one, for two reasons:—

(1) It is too vague, merely indicating that a person is not wholly insane. As it is doubtful what meaning can be attached to wholly insane, this does not help us much. But even assuming that by wholly insane was meant a state of idiocy (amentia) or a state of imbecility (dementia), there are numerous varieties of insanity to which the term "partial insanity" might be made to apply. And as a matter of fact, the term "partial insanity" is only meant to apply to the form of delusional insanity sometimes called monomania.

(2) It is misleading, being sometimes used in regard to *time*, and as synonymous with intermittent insanity, and sometimes in regard to *ideas*. It is, of course, in its latter meaning that Cockburn used it (adopting the phrase of Esquirol, Pinel, &c.).

However, the phrase is incorporated with the English law of criminal responsibility, and therefore cannot be avoided, though in his suggested classification the writer has tried to do without it.

The possibility of such an insane condition as referred to above[1] would be objected to by scarcely any physician acquainted with the character and habits of insane persons. There are undoubtedly cases where the mental disorder seems limited to one or two subjects,[2] while upon other subjects the mind seems perfectly clear and rational. "If that is so," said Cockburn[3] in effect, "then a person doing a certain act under the influence of an insane delusion is no more answerable for his act than if his mind was totally deranged." It was thought by lawyers that attention must be concentrated upon this circumscribed area of insanity,[4]

[1] *I. e.*, in the definition of "partial insanity."

[2] *Vide* writings of Pinel and Esquirol.

[3] Arguing as Counsel in *MacNaughten's Case.*

[4] Not without encouragement from medical quarters, however (although modern

and it seemed all-important to discover whether or not the act was the obvious result of the delusion; while it is clear that this theory of "partial insanity" in its transit from the region of medicine to that of law had insensibly changed. It was no longer a scientific hypothesis, but a rigid dogma. The hypothesis (to which little objection can be raised)[1] that insanity may manifest itself by delusion on one or two points while not appearing on the majority of subjects, has been transformed into the following arbitrary statement. Where insanity manifests itself on one or two points, then the person so suffering is insane on those points, though sane and able to argue sanely on other matters. Therefore it is essential to determine whether the act is the result of the particular delusion, in which case the agent is to be treated as insane, while, if the act cannot be traced to the delusion, then it is to be regarded as the result of sane reasoning, and the agent is responsible.

This line of argument appears in the Answers of the Judges, and is, it is submitted, an incorrect interpretation of even the medical theory of "partial insanity." Erskine, in *Hadfield's Case*, conceived delusion to be the true test of insanity, and neither the arguments used in *MacNaughten's Case* nor the subsequent discussion in the House of Lords gives us reason for supposing that the legal attitude of mind had yet advanced to the consideration of the possibility of the existence of insanity in the absence of delusion. For physicians to-day practically concur in regarding the presence of delusion to be, as a rule, but evidence of a general unsoundness of mind, however circumscribed the range of its influence may appear. This is merely another way of

scientific writers have modified their views on this subject of partial insanity). *Vide* Trial of MacNaughten, Cockburn's examination of Dr. Monro. "Monomania may exist with general sanity."

[1] The only objection is, that it suggests the mind is sane on other points, whereas very often the delusion is merely the outward sign of a general unsoundness.

stating the theory of "partial insanity" as given above. The legal fallacy lay in assuming that, *because* the insanity only manifested itself on *one or two* points, *therefore* the sufferer must be regarded as sane on *all* other points.[1]

Before considering the assumptions underlying the legal view of partial insanity, some reference must be made to Lord Brougham's hostile attitude on the subject. Lord Brougham, as may be gathered from his remarks in the House of Lords, was not prepared to deny the medical theory of partial insanity, but argued that it should only be recognized for legal purposes when the person so suffering could not distinguish between legal right and wrong. "If the perpetrator," he contends, "knew what he was doing, if he had taken his precautions to accomplish his purpose, if he knew at the time of doing the desperate act that it was forbidden by the law, that was the test of sanity; he cared not what judge gave another test."[2] It is clear, however, that both Hadfield and MacNaughten knew they were committing a legal wrong, but nevertheless they were acquitted, while furthermore the Answers of the Judges implied that the knowledge required is something beyond the knowledge that the act was legally wrong (*vide* Answers II and III).

The assumptions underlying the answers of the fourteen judges, so far as they apply to delusional insanity, seem to be as follows:—

(1) The insane delusion, in order to be an excuse, must be a delusion as to the existence of such facts as would constitute an excuse if they existed (*vide* Answer IV).

(2) That the person suffering from such delusion does argue correctly from his false premises (*vide* Answer IV).

(3) That an obvious connection must exist between the delusion and the deed (*vide* Answers generally).

[1] *Vide* Answer IV.

[2] Debate in House of Lords, 1843, *Hansard*, Vol. LXVII, p. 718.

Persons who in addition to these "partial delusions" are "in other respects insane" (whatever that may mean) *possibly* fall within the scope of Answers II and III.[1]

With regard to (1) it is obviously unfair to treat what the judges term "a partial delusion" (a worse term even than "partial insanity"—either an idea is a delusion or it is not) in the same way as a mistake as to facts made by a sane man, since it is contrary to all medical testimony to assume that an insane man has the same measure of knowledge and self-control which a sane man is presumed to have.[2]

This rule of law assumes that if a man acts out of revenge, it is immaterial whether it be a sane or an insane man so acting. It practically holds a man confessed to be insane accountable for the same reason, judgment, and controlling mental power that is required in perfect mental health. It is in effect saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness.[3]

This leads us up to the second assumption—that the man suffering from such delusion does argue correctly from his false premises.

The law says in effect—*A* has a delusion (the result of mental disorder) that *X* has done him some wrong. *A* must calmly and deliberately take into consideration all those motives which a sane man would be presumed to weigh, were the delusion an ordinary mistake. For instance, a sane man would know that if he killed *X* out of revenge, he was

[1] *Vide post.*

[2] Moreover, as to the conclusion of the judges, that if the delusion had been true, the point then is, would the prisoner have been justified? This can only apply (assuming for the moment the test to be fair which the writer denies) to a limited number of delusions. To the many instances of wild and fantastic delusion the question would be valueless as a test, and where the delusion was of such a character as could be supposed to be grounded on fact, the test would be only mischievous and misleading, as urged above.

[3] *Vide* judgment of Judge Ladd. *State* v. *Jones* (New Hampshire) cited by Maudsley (*Responsibility in Mental Disease*).

doing an act quite disproportionate to the grievance complained of—an act, moreover, punishable at law; therefore the insane man must also be presumed to be open to this line of reasoning.

Now unless we refuse to admit the evidence of those who have especially studied these cases, such an assumption is quite unwarrantable. It takes for granted that the delusion has a circumscribed area, and prejudges the question as to whether the delusion is or is not merely a symptom indicating a general unsoundness, by assuming that it is *not*. Of course a case might be found where, apart from the delusion, the man would be for all practical purposes sane, but such cases are, doctors assures us, very rare. "Cases of pure monomania," says Dr. Winslow,[1] "are certainly of rare occurrence; for even in patients who appear to be monomaniacs, the mind, if carefully analysed, will be found to be under the influence of several delusions." "Outside the recognized circle of morbid ideas," declares Dr. Maudsley,[2] "there will be found evidence of mental disorder . . . as constitute a general alienation apart from the particular delusion." "An insane delusion will not spring up and grow in an unsuitable soil; and the soil which is suitable to it is insanity." "His (a man's) mind is not unsound upon one point, but an unsound point expresses itself in a particular morbid action."

The same line of criticism may be applied to the third assumption—that an obvious connection must exist between the delusion and the deed. It is scarcely to be wondered that where the law arbitrarily assumes a man's insanity to be confined to a certain class of facts, it takes care that strong evidence shall be adduced as to the connection between the delusion and the act. Experienced judges, however, such as the late Sir James Stephen, were gradually

[1] *Vide Mad Humanity*, p. 39.
[2] *Vide Responsibility in Mental Disease*, p. 220.

impressed by the unvarying testimony of medical men to the effect that the connection between the delusion and the act is often not apparent, and Stephen very sensibly used to warn juries[1] from concluding that no connection existed between a madman's conduct and his delusion, merely because a sane man would see no connection between what the madman does and what under the influence of delusion he believes. "Even," says Dr. Maudsley,[2] "the acts which are the offspring of delusion are not such as are adapted to the attainment of the delusive aim; they are the results of insane reasoning from insane premises, or of impulses which spring up in insane minds without being connected with the existing delusion." As a matter of fact, all the assumptions above referred to seem to spring from a metaphysical view which would label the mind into separate compartments independent of one another.

No real progress was made in the treatment of mental disease till it was looked at from a physiological point of view, whereby we view the impairment of any one part of the body as more or less attended by disturbance in the other parts. But although physicians now unanimously adopt the physiological point of view, most lawyers still cling to the metaphysical aspect of mind.

A person who has a gouty swelling in the foot has very frequently not merely to put up with the local pain—for the swelling is the symptom of a gouty diathesis and points to the presence of acid products in the blood—but suffers from other unpleasant symptoms also, such as headache or irritability of temper. Now the lawyer's attitude (as reflected in these Answers) is much as if a physician would say: "The test of gout is a swelling in the foot: the gout is confined to the toes, and the rest of the body is free from gout. An act, such as hobbling, is the direct

[1] *History of Criminal Law*, Vol. II.
[2] *Responsibility in Mental Disease*, p. 210.

outcome of the gout; but irritability of temper and the headache are clearly something quite different; they have nothing to do with the foot and have therefore nothing to do with gout."

To turn from this physiological analogy to actual cases of delusional insanity, two cases may be cited as illustrating our point.

1.[1]—*A* with a delusion as to windmills, mutilates the legs of *B*. No apparent connection between delusion and deed. *A* explains that being placed where no windmills existed, he committed the act in order to be removed to where there were windmills.

2.[2]—*A* with delusion as to persecution, beats in head of *B*, whom she does not associate with persecution. *A*, moreover, very fond of *B*.

It is obvious that in each of these cases the connection between the delusion and the act is not apparent. In the first case, the insane reasoning of the patient can alone offer an explanation. In the second case, not even the patient can explain the connection, but according to medical evidence, both the delusion and the homicidal act are but symptoms of a general unsoundness—a deep-rooted disease giving rise to morbid impulse.

It is curious that Lord Brougham, who took such exception to the theory of "partial insanity" as interpreted by lawyers, should have based his criticism on the following line of reasoning. He contended[3] that "we are wrong in speaking of partial unsoundness. We should say that the unsoundness always exists, but it requires a reference to the peculiar topic, else it appears not . . . but the malady is there, and as the mind is one and the same, it is really diseased while apparently sound, and in reality its acts,

[1] *The Windmill Case*, cited by Stephen (*History of Criminal Law*, Vol. II), Taylor, *Med. Jurisprudence*.

[2] Case cited by Campbell Clark, *Mental Diseases* (1897).

[3] *Waring* v. *Waring* (1848), 6 Moore's Privy Council Cases, 341.

whatever appearance they may put on, are only the acts of a morbid and insane mind.[1]

Whilst holding this view, Lord Brougham insisted (as has been noted) that the proper criterion of responsibility was a knowledge of legal fight and wrong, not a knowledge of moral right and wrong, that if a man is sane enough to know the law punishes his acts, then, whether doctors call him insane or not, he ought to be liable to punishment. At first sight the view here expressed, and the arguments used by Lord Brougham in *Waring's Case*, seem hard to reconcile. One who objected to the departmental character of the legal doctrine of "partial insanity," would surely scarcely have opposed the verdict in *MacNaughten's Case* or in *Martin's Case*[2] (the lunatic incendiary of York Minster). They are not, however, really inconsistent (although open to objections on other grounds). Lord Brougham[3] seems to say: "I do not not object to 'partial insanity' as a medical hypothesis, but if it is urged in mitigation of a man's responsibility, then I contend that the delusion must be a very mad one, so mad that an appreciation not only of moral distinction, but also of legal consequences, must be absent from the man's mind. If the so-called 'partial insanity' (which I would rather call lunacy) extend to this, then although the man's acts in other respects seem sane, they are not so, the disease is only latent, and although only expressing itself in a particular direction, seriously affects the entire mind."

It seems to the writer that Lord Brougham's views

[1] This is very like the argument used by Dr. Maudsley. Strange that holding in common this view, each should have applied it in such opposite ways.

[2] *R.* v. *Martin* (1829). *Annual Register*, Vol. LXXI, pp. 71 and 301.

[3] What was called partial insanity, if it existed at all times, made a person decidedly a lunatic. Whether or not the act committed . . . was the act of a sane or insane person must depend on the state of his mind . . . if he knew what he was doing, and knew that it was illegal, that was the test of sanity. —*Lord Brougham. House of Lords.*

present a curious mixture[1] of the metaphysical and physiological points of view. The metaphysical view seems to lead to the following conclusion—That if he is mad on ninety-nine points out of a hundred, the hundredth being a knowledge of Criminal law, then he is a responsible agent.

The physiological trend of Lord Brougham's argument appears in his agreement with many medical men of to-day, that delusion is only a symptom of general unsoundness.[2]

A final word of criticism. Lord Brougham seems to assume that a man is not insane who has not taken leave of all human feelings, and has not shaken off those motives (*e.g.*, fear of punishment) which actuate sane men. Those who have had to do with Lunatic Asylums know this is not so, and as most lunatics are aware of the legal consequences attaching to their actions, we must be prepared, therefore, to make the majority of madmen criminally responsible, if the test of knowledge of *legal* right and wrong be accepted. But even the judges in *MacNaughten's Case*, faulty as their rules may be, would not go to this extreme,[3] and as perhaps scarcely a single judge would be found to defend it at the present day, no practical purpose can be served by discussing it further. Our sole excuse for alluding to it was that it afforded an illustration of the difficulty experienced by a very acute and able lawyer in comprehending the phenomena of insanity.

So much for cases of delusional insanity, where the offender is not "in other respects insane." Where he is in other respects insane, we have to fall back upon the test given in Answers to Questions II and III. But whether these apply to all cases of insanity, cases characterized by delusion or not, is highly doubtful. The inadequacy of the

[1] What scientists would call a mechanical, not a chemical mixture.

[2] The writer's objection to the metaphysical argument may be largely gathered from his criticism of the assumptions which seem to underlie the Answers.

[3] Though the answers are contradictory and anything but explicit on this point. Yet read in the light of previous judicial decisions, it would seem that moral right and wrong is the ultimate test.

knowledge test is best shown in cases of Emotional or Affective Insanity, where there is no delusion; but even where delusion exists, the test is frequently valueless, for the act is often the outcome of the diseased emotions rather than of the delusion (*R.* v. *Wilson*, 1864; *R.* v. *Brough*, 1854).

(ii)—*Emotional Insanity* (*Chronic*).

A. With delusion.

In the preceding section consideration was given to those cases of insanity where the mental disease had mainly at any rate affected the intellect, the reasoning powers. More often, however, it affects both the intellect and emotions; both the faculty of thinking—perceptive, and the condition of feeling—receptive. Nervous complications, as might be expected (in particular, epilepsy), often attend this form of mental disease. In the first place, certain cases of emotional insanity accompanied by delusion will be briefly considered. Then the more difficult subject of emotional insanity unaccompanied by delusion will be discussed.[1] In these former cases the madness is more apparent than in cases of obscure emotional disturbance—the theatrical element is more to the front, and the prisoner is far more often acquitted by juries. The knowledge test is again, however, of small value, for although in some cases the mind may be so obscured as to prevent the offender from knowing what he is doing, in other cases there certainly seems to be a general consciousness of the nature and quality of the act, not a knowledge in the sense that Stephen explained the word, but knowledge in the popular interpretation of the term as understood by a common jury.

R. v. *Brough* (1854)[2] and *R.* v. *Wilson* (1864).[3] These

[1] *Vide ante*, for physiological distinction between emotional and intellectual disturbance.

[2] 2 *Foster and Finlay Reports*, 838.

[3] Cited in Stephen's *History of Criminal Law*, Vol. II, p. 91.

cases of impulsive insanity were accompanied by certain delusions and hallucinations. Each was the case of a mother who had murdered her children. There was no evidence to show that the nature and quality of the act was not appreciated, but the prisoner justified her deed on the strength of her delusions. In each case the prisoner was acquitted.

Prince's Case (1898).[1] The prisoner was indicted for killing the popular actor, Mr. Terriss. Evidence was given showing that he suffered from various delusions and hallucinations, and was noted for his strange and violent conduct. There was evident premeditation as regards the murder. Channell, J., explained the knowledge test, and said that the prisoner's disease must be such that he did not know the nature and quality of the act, &c. The jury's verdict was, "Guilty of wilful murder. He knew what he was doing and to whom he was doing it, but on the evidence he was not responsible for his actions." He was ordered to be confined as a criminal lunatic. Here the jury took the bit between their teeth and returned a verdict practically acquitting the prisoner, despite the fact that according to the rule in *MacNaughten's Case* he ought to have been declared responsible.

B. Without delusion, *i. e.*, where there is an apparent absence of intellectual disturbance.

Sir John Nicholl said in 1831[2] that there had never yet been a case in which insanity had been held to exist without delusion. Even to-day the cases of acquittal on the ground of insanity, where no delusion is proved to have existed, are extremely rare.

In two important legal text-books (*Pope on Lunacy*,[3]

[1] *Times*, Jan. 14th, p. 4.

[2] *Wheeler* v. *Alderson*, 3 Haggard's Ecclesiastical Reports, 74.

[3] *Pope on Lunacy*, pp. 386 and 391.

"Unless delusion, so often referred to as the real test of insanity, has been

Russell on Crimes[1]) it is implied that the law does not recognise insanity without delusion. In the latest book on the subject[2] the authors state that the law contains nothing in their judgment to prevent such cases being recognised, although, as a matter of fact, they consider cases of impulsive and moral insanity have not yet obtained legal recognition. The present writer submits that in certain cases impulsive insanity has been recognised, despite the fact that the decisions are admittedly contradictory, and that one judge airily dismisses what another judge asserts to be an important rule of law. Now it is agreed by all medical writers and by many jurists that, broadly speaking, insanity without delusion (by which is meant emotional insanity with no marked intellectual disturbance) is no mere medical fancy, but as much a scientific fact as small-pox, and it might fairly be said that just as the existence of delusion unattended by other symptoms will not definitely prove insanity, so the mere absence of delusion will not disprove insanity (*vide* writings of Griesinger, Maudsley, &c., all attesting to this fact).

It is with reference to the criminal responsibility of insane persons, whose insanity is unmarked by any obvious intellectual derangement, that the dispute (as might be expected) between physicians and lawyers has been most bitter. Mutual recriminations, however, will not serve to solve the problem, and it is to be regretted that more attempts[3] are not made by the two professions to appreciate

proved to exist, the apparent absence or inadequacy of motive for the act, or the presence of so-called uncontrollable impulse, is not to be accepted as proving insanity," p. 391.

[1] *Russell on Crimes* (6th Edition, 1896), p. 139.

[2] *Insane and the Law* (Pitt-Lewis, Q.C., Percy Smith, M.D., &c.).

[3] The ablest attempts which the writer has come across are those by Sir James Stephen (*History of Criminal Law*, Vol. II, and General View), whose strenuous endeavours for reform on the subject were unfortunately attended with so little support, and by Mr. Pitt-Lewis (*The Insane and the Law*). Perhaps the best discussion of the subject, particularly with reference to the codification of the

the necessarily diverse standpoints from which this difficult subject must be regarded. The object which a lawyer has in view is to secure uniformity of conduct; and the main purpose of the criminal law is to prevent, so far as possible, the occurrence of acts which, if frequent, would bring about a dissolution of the State. The lawyer accordingly views with suspicion any proposed exceptions to the recognised rule of responsibility, and in approaching the subject of insanity without delusion, he is confronted by cases which medical experts indeed assert to be irresponsible, but which to his way of thinking look dangerously like mere cases of depravity. A man, apparently rational, and hitherto quiet and law-abiding, commits a dastardly crime. This, says the physician, is a case of impulsive insanity. He laboured under an irresistible impulse. Now the prisoner may be perfectly aware of both the moral and legal character of his act, and he clearly will not escape responsibility if the test to be applied is one of knowledge only. But he could not help himself, urges the physician: he was not responsible for his action. To which the lawyer replies much as follows: You say that *X* is irresponsible, that he could not help himself, and the chief proof that you offer is the very act complained of. You speak of morbid impulses, but are not all impulses to crime morbid? You point to such impulses in certain cases as constituting the whole effect of the disease. Why should they excuse crime any more than those violent and sudden impulses which beset sane men? The logical outcome of your arguments would be that all crime was the result of disease, and that therefore no criminals are responsible. An apparently motiveless murder has been committed, and you christen it grandiloquently, homicidal mania. All the evidence points to the prisoner

law, is found in the Report of the Select Committee (Homicidal Law Amendment Bill, 1874). On the medical side, Dr. Maudsley's writings are very fruitful in suggestions.

being a rational man, and when we ask for the proof of his insanity you point to the sudden act for which he is arraigned, and if we ask for further proof, you talk vaguely of hereditary tendencies and the absence of a motive. We cannot inquire into motive; and many criminals might plead an hereditary taint. You say, moreover, that the impulse was irresistible, and you compare it to a case of physical convulsion; but it is an easy matter to test whether a patient has or has not control over his movements, *i. e.*, whether he is simulating, though we cannot look inside a man's mind and say how far morbid impulse was resistible. Merely because the impulse was unresisted you seem to infer it was irresistible. The only safe criterion is the old one—did he know he was doing what was wrong? Then if, after weighing the evidence, the jury conclude that he did, the law cannot be expected to deal with medical subtleties as to the power of resistibility, but should hold a man responsible and convict him.

This, we take it, is roughly speaking the hostile attitude assumed by the majority of lawyers in cases of impulsive insanity. The question of moral insanity stands on a rather different footing, and as there is considerable difference of opinion between physicians themselves as to how far it can be recognised, it has been excluded from the present argument and will be dealt with subsequently by itself.

Now although, after studying both sides of the question, one is obliged to admit that physicians have been fully as uncompromising and dogmatic as the lawyers, and that the arguments concerning the medical theory have occasionally been pushed to an extreme so as to confound all crime with disease, yet it is submitted that cases of impulsive insanity should not be arbitrarily prejudged by the lawyer; and that while he is right in demanding evidence such as may show that the case is on a different footing from one of ordinary depravity, yet he is not right in making light of hereditary

tendencies, or in requiring the physician to perform a metaphysical impossibility. The physician may well reply: "You have no right, in the avowed absence of special knowledge, to pooh-pooh any evidence we can give as to the effects upon the mental constitution of hereditary tendencies or obscure mental disease. To the layman the fact that the pupils of a man's eye are unequal in size and that there is a tremulousness about the muscles would convey nothing of importance. But to the medical man such phenomena, apparently trivial, may be signs of one of the most fatal forms of mental disease—that commonly called general paralysis of the insane.[1] You ask how we can look into a man's mind and tell how far an impulse was resistible. We might with equal reason ask you how you can definitely say that a man knew right from wrong without performing an equally impossible task. We can of course only judge from deductions based upon observation and experience, that when certain symptoms exist, it is highly probable that the patient is suffering from a disease that has deeply affected the tone of his nerve-centres, rendering them so excitable that very slight external influence puts them into a state of furious commotion and gives rise to violent impulses—the reasoning powers are to all appearances clear:[2] yet the nerve-storm generated (producing what can be called emotional insanity) sweeps everything before it. Moreover, when in cases of impulsive insanity a person kills—with no apparent motive—one who is dear (often indeed having implored to be put under restraint when the impulse was felt to be coming on), why should you apply a test, *e.g.*, the knowledge test, which is quite valueless, and which leaves out of consideration the crucial point of self-control?" Some physicians indeed are, it must be admitted, inclined

[1] *Responsibility in Mental Disease* (Maudsley); *vide* preface to third edition (1892), where a case of general paralysis of the insane is mentioned.

[2] For a disease affecting nerve tone does not necessarily produce intellectual confusion.

to assume the irresistibility of the morbid impulse—thus creating a medical dogma as indefensible as the contrary assumption of the lawyer that an impulse is resistible. Whether it be or be not resistible should (as maintained elsewhere in this article) be purely a question of evidence to be decided by the jury in every case.

So, whilst admitting the extreme difficulty attaching to these cases, it is impossible to defend either from the point of view of morality, or even of expediency, the present criterion imposed by the law. The writer hopes to show, from a brief consideration of certain specific cases, that the only proper criterion of responsibility is that which will satisfy both these questions—Did the prisoner know what he was doing? Could he help doing what he did?

(a) *Impulsive Insanity.*

By impulsive insanity is meant a disease affecting the emotions and power of volition, such as impels the patient to a sudden act. What has been called homicidal mania[1] (the

[1] There are, however, certain other manifestations of morbid impulses, such as suicidal mania (impulse to self-destruction), Kleptomania (impulse to steal), Pyromania (impulse to set fire to property), Erotomania (violent erotic impulse), etc. Dr. Maudsley (*Pathology of the Mind*, 345) thinks that such cases are as a rule found to exist only where there is a measure of imbecility, though sometimes manifested by young women of average understanding at the age of puberty, when the system is subject to a kind of constitutional revolution. These cases occupy the borderland between crime and insanity: whether they are unsound enough to be treated as insane and irresponsible, or sound enough to be treated as sane and criminal, must be settled, not by any general rule, but by the particular consideration of each case on its merits.

According to Dr. Winslow, however (*Mad Humanity*, pp. 76–9), the average kleptomaniac is generally both intelligent and truthful: there is simply the one failing.

Dr. Griesinger, in treating of Pyromania, says (*Mental Diseases*, 270) :—"The feeling of mental anxiety and the general disturbance which arises from the morbid condition of the faculties . . . impel the individual to relieve by an outward act, however negative and destructive in character, the profound discord and uneasiness which rule within, and thereby to obtain peace and tranquillity . . . let there be a careful investigation in every case into the individual psychological peculiarities which lie at the bottom and give rise to this impulse . . . of course, there

impulse to kill) may be instanced as the most serious outcome of this form of insanity. The reasoning faculties are for the most part unimpaired, though, as was stated previously, delusional insanity may co-exist with impulsive mania (*vide R.* v. *Brough, R.* v. *Wilson, ante*). Frequently the sufferer is fully aware of the nature and quality of his act. Against his own reason and moral inclination, however, the patient is impelled to commit some deed of violence, *e. g.*, husband killing wife, mother killing her children. The morbid impulse exists in varying degrees, and the question as to how far it has affected the power of control depends upon the special circumstances characterising the individual cases. When Mr. Justice Stephen said (in *R.* v. *Davies*[1]) that a man may be both insane and responsible for his actions, he made a statement to which most physicians, so far as the writer has been able to discover, would be prepared to agree. It is of importance, then, to remember this in dealing with cases of impulsive insanity. The mere fact that the impulse came from disease is not tantamount to saying that it was irresistible. It is quite clear, then, that the question as to how far the impulse is deemed to be irresistible, is for the most part a matter of evidence; no rule can be laid down. In a well-known passage, Dr. Maudsley says, "To hold an insane person responsible for not controlling an insane impulse of which he is conscious, is in some cases just as false in doctrine and as cruel in practice as it would be to hold a man who is convulsed by strychnia responsible for not stopping the convulsions, because he is all the while quite conscious of them."[2]

are cases where the insane set fire to buildings under the impulse of motives very different, *e.g.*, Martin, the incendiarist of York, who suffered from hallucinations.

All these experts, however, agree that each case must be judged on its merits, and requires careful investigation, and Dr. Winslow has specified certain mental and physiological indications for judging alleged cases, so as to distinguish between insanity and crime.

[1] 14 Cox C. C. 563 (1881).

[2] *Responsibility in Mental Disease* (preface, p. viii).

Granted the irresistibility of the impulse, and Dr. Maudsley expressly limits it to some cases, it would be idle to quarrel with the analogy. But Dr. Maudsley seems rather inclined, judging by the general trend of his writings, to underrate the importance of such evidence as may help to determine how far the power of control has been affected. Keeping to Dr. Maudsley's analogy, may he not be asked as a physician whether it is not a fact that in strychnia poisoning there comes a period when the convulsive impulse, though strong, is resistible? Many physicians are rather too prone to assume the irresistibility of the impulse on very slight evidence, just as lawyers are too inclined to make the opposite assumption. Some cases where impulsive insanity was set up as a defence will now be cited in order to show—

(1) How far the knowledge test is able to meet the difficulties of such cases.

(2) The conflicting character of legal decisions, which attest the difficulty and even impossibility which some judges have felt in applying the criterion in question.[1]

[1] *Blackburn, J.* (1874, *Select Committee*); Stephen, J., used to construe knowledge test very liberally, even to the extent of including power of control.

(To be continued.)

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

Venezuela.

THE dangers of the present doubtful position in Venezuela will be amply compensated for in the gain to the cause of international arbitration, if the solution of the dispute is referred as proposed to the Hague Tribunal; and an important precedent will be established for the future usefulness of that court if resort to it is possible after such acts on the one side as the seizure of men-of-war and merchantmen, the bombardment of forts, and the institution of a regular belligerent blockade and a Prize court, and on the other an arrest of the resident subjects of the belligerent powers (fortunately not persisted in). The chief cause of complaint is eminently one for such treatment, namely, the payment of compensation due to foreign residents for damages suffered by them in the revolutionary wars of 1898 and 1900; and besides Great Britain, Germany and Italy, who are now taking the common action described above, France has announced that she has a similar claim against Venezuela. From the statement of the German Government it is to be gathered that Venezuela put forward the argument that, owing to the internal legislation of the country, as foreigners could not be treated differently from Venezuelan subjects, it was impossible to arrange these claims diplomatically. This argument is declared by the German Government not to be in conformity with International law; but it was recognised by the British Government during the American civil war as the strict rule of war applicable to the damages then suffered by British subjects, though in practice the American Government paid compensation as found due by a mixed commission; and the action of Venezuela in insisting on her own adjudication of such claims has a parallel in the British commission appointed to ascertain similar losses of

neutral residents in the Boer war. The international practice in favour of both the courses demanded by the complaining Powers has, however, been so constant in late years that they are practically now accepted as rules of law as well. The claims of both nations also include one for damages for unfulfilment of the contractual obligations of the Venezuelan Government towards their subjects; but it is not the practice of our Government to collect debts for its subjects; and it has expressed its willingness that this and the war claims should be referred to a mixed commission upon receiving immediate satisfaction for what it treats as the primary causes of complaint, namely, interference with British property and British ships, both on the high seas, in Venezuelan waters, and even in British territory and waters, by Venezuelan men-of-war. On this, however, it is fair to say that the Blue Book admits that in several of these cases there was evidence of smuggling taking place, and of help given to the Venezuelan revolutionaries; and that Venezuela claims the ownership of the territory in question, the island of Patos, although our Government has always treated it as British. A counterclaim was also raised by the Republic for damage done by the *Ban Righ*, a revolutionist gunboat allowed to equip in British ports; but the answer made seems conclusive, namely, that the Minister for Columbia vouched for this ship belonging to his Government, and Columbia was then not at war. If it had not been for the violation of territory there would hardly seem to have been occasion for summary methods to obtain satisfaction; and the attitude of the British Government reflects this view. Joint action by two or more Powers, however, generally results in both going further than they would have singly.

Most favoured Nation Clause in Treaties.

Two questions of considerable importance to ourselves have been raised with regard to the effect of the recent

Brussels Sugar Bounties Convention, to which Austria, Germany, France, Great Britain, Belgium, Holland, Spain, Italy, and Sweden and Norway are parties, the general effect of which is, that it is agreed to abolish generally *inter se* direct or indirect bounties on the production or export of sugar, with the reservation of a trifling and limited surtax in favour of home sugars as against foreign sugars, and to enforce this by a penal clause by which it is agreed to impose a special duty on the import of sugars from countries granting bounties equivalent to the amount of such bounties, with the option of prohibiting the import of bountied sugars altogether. The first question is, whether the penal clause in the treaty obliges Great Britain to impose countervailing duties against sugars from her self-governing colonies if bounty fed; the second, whether the imposition of such countervailing duties upon sugars of a non-signatory Power such as Russia, if bounty fed, is a breach of the most favoured nation clause in treaties of commerce between a signatory and a non-signatory Power.

As regards the first, the material provisions of the Convention are, that it applies to the oversea provinces, colonies, and foreign possessions of the signatories, except the British and Dutch colonies otherwise than as under Articles 5 and 8 and the special protocol annexed to the treaty. By Article 5 it is agreed to admit at the lowest rate of import duty the sugars of the signatories or their colonies or possessions which do not grant bounties and to which Article 8 applies. By Article 8 it is agreed by the parties for themselves, their colonies and possessions, except the British and self-governing colonies and British India, to prevent bounty-fed sugar passing in transit through their territories from enjoying the advantages of the Convention or of the market for which they are destined. By the protocol Great Britain declared that no bounty direct or indirect should be granted to sugars of the Crown colonies: that, as an exceptional

measure and reserving in principle entire liberty of action as regards British imperial fiscal relations, no preference should be granted to Colonial sugars as against sugars from any signatory State: and that the Convention would be submitted to the self-governing colonies and India, for their adherence if they wished, while she adhered to it on behalf of the Crown colonies. The Dutch Government gave a similar undertaking as regards its colonies.

It would certainly have seemed better to have dealt expressly with this point which was raised at the conference and to which attention has been called abroad since the Convention; but our Government probably thought that the specific declaration made by the British delegates at the opening of the Conference that they could not discuss fiscal arrangements between the British dominions *inter sese* "which must remain absolutely outside any convention" as they had only authority to sign a convention applicable to the United Kingdom, was sufficient evidence of their intention that Great Britain could in no case apply the penal clause to her colonies or possessions; and that this was so understood at the time is shown by the Austrian delegates' request that in view of this declaration Great Britain should make the declaration which is embodied in the protocol. It is true that the British delegates also endeavoured, unsuccessfully, to secure a reservation to the United Kingdom of the right to grant bounties to the West Indies to an extent equivalent to that of those allowed to France and her colonies; and also to confine the penal clause to Europe: and that there was a suggestion made by the Belgian Premier that Great Britain should approach the self-governing colonies with a view to their adherence, it being understood that so long as they remain non-exporting countries of sugar they might retain any internal bounty or protection, but otherwise the penal clause would be applied to them by Great Britain.

But Lord Lansdowne only instructed the delegates to accept the Austrian proposal and the Belgian suggestion of inviting the self-governing colonies to adhere "subject to entire freedom of Imperial fiscal relations:" and the Colonial Office informed those colonies that the Imperial Government proposed to suggest a clause in the treaty, that any convention approved by the Conference shall not be applicable to them unless they gave notice of their adherence to it. Coupled with these declarations the words "complete fiscal freedom" can well bear the meaning which our Government attaches to them and that which was assigned to them at the Conference: but the true meaning could anyhow be definitely ascertained before ratification.

The second question raises a much greater difficulty. The Commercial Treaty between Great Britain and Russia of 1859, by Article 10, grants mutually the most favoured nation treatment; and Article 2 provides that no other or higher duty should be imposed on the importation into the British dominions or possessions of any article of Russian growth, produce or manufacture, than is payable on the like article of any other foreign nation, and similarly *vice versâ*, with regard to British imports into Russia, and the same provision is made with regard to prohibition of importation. There seems no reason to doubt that the Russian Government is right in maintaining that "the most favoured nation clause leaves both parties complete freedom with regard to internal measures for the development of their industry:" and the United States have enunciated the same view, so long ago as 1792. It is acknowledged that the British Government was advised in 1880 by its law officers, that to impose countervailing duties on particular foreign bountied sugars would be a breach of the commercial treaties: and in 1897 our Foreign Office seems to have informed the Chambers of Commerce to the like effect. This very question

was, moreover, raised, and sharp differences of opinion on this point were manifested at the previous Sugar Bounty Conferences held in 1887 and 1888 (the resolutions of which were abortive), in which France, Russia, Belgium, Denmark, Sweden and Holland objected to its validity, while Germany, Spain, and ourselves supported it. In 1894 and 1899, when American legislation adopted the principle, Germany protested against it, and on the Indian Government doing so in 1899, Austria made a similar objection. The history and scope of the most favoured nation clause has been lately dealt with in a very interesting article in the *Revue de Droit International* (1902), p. 66, by Dr. Visser, in which the author expresses the opinion that the right to levy *droits compensateurs* (countervailing duties) is not yet by general international practice considered to be compatible with the most favoured nation clause in treaties of commerce, though as a principle it has gained ground. In connection with this clause there has been more discussion with regard to the effect which the grant of negative commercial privileges, such as tariff concessions, in favour of one nation only, has on this clause. The United States from very early in their history adopted the reciprocity doctrine, viz., that this clause only applies to gratuitous privileges accorded to other nations, and not to those "granted on the condition of reciprocal advantage" "or concessions for equivalents express or implied," stated by such Secretaries of State as Mr. J. Q. Adams in 1803 and 1817, and Mr. Livingston in 1832. This view has been more recently upheld by the same Government and its courts with regard to the treaty of 1875 between that country and Hawaii (Wharton, *Digest of Int. Law*, s. 134; Taylor, *Int. Law*, s. 354); and apparently will be also with regard to its proposed tariff concessions in favour of Cuba. But in 1897, when Canada adopted a tariff giving British goods special concessions in entry duties, Germany and Belgium claimed the like privi-

leges under this clause in their commercial treaties: and our Government gave way, and the privilege was only secured by denunciation of those treaties. M. Visser opposes this view on the ground that, from the point of view of a State which has by treaty with another the right to equality of treatment with all others, it is immaterial whether that other gives or receives tariff concessions from another in consideration of reciprocity or without any equivalent; and he points out that some recent treaties stipulate for unconditional reciprocity under this clause. M. De Martens, however, expresses an opinion in accordance with the American contention (*Droit International*, ii, 322); and Professor Lehr (*Revue de Droit International*, 1893, 313) inclines the same way. Germany seems to have acquiesced in the United States doctrine (*Times*, Jan. 16, 1903, Count Posadowsky): but a precedent of our own rather tells the other way, namely, the clause in this very Anglo-Russian treaty of 1859, saving the special commercial arrangements then existing between Russia and Sweden from mutual concessions. The jealousy with which our own Government views any attempt to interfere with equality of treatment under this clause is shown by the reprisals resorted to in 1840 against the Two Sicilies for breach of the commercial treaty of 1816 by granting a monopoly of working sulphur in Sicily. On the present occasion, however, our Government has a second string to its bow in its offer to Russia to denounce the treaty, which has not been accepted.

Recent Arbitrations.

Several arbitration awards have been recently announced. In the Argentine-Chile dispute with regard to the boundary line between their territories the decision (given by our own King) is a compromise between the conflicting claims, Chile

obtaining something over five-ninths of the territory in dispute. The award of M. Asser in the question at issue between the Russian and United States Governments, condemning the action of Russian cruisers chasing American fishing boats illegally fishing within Russian territorial waters, and seizing them beyond those limits, is an important decision in view of the opinion formerly maintained by the courts in the United States that by the Law of Nations a Sovereign has the right to seize and punish foreign vessels transgressing his municipal law within the limits of his sovereignty, though he finds them outside those limits; but this view was definitely disavowed by the United States Government on this occasion, and American jurists express the same opinion (Taylor, *Int. Law*, 248). The King of Sweden has also published his decision on the claims, submitted to his arbitration, of German residents in Samoa for damage suffered by them and their property by the military operations of the British and American naval forces on the occasion of the disputed succession to the kingship, which illustrates the difficulties attending the working of the *tri-dominium* enjoyed by the three Powers over Samoa till the partition of the islands between them in 1899. The award proceeds strictly according to the lines laid down by the general Act of Berlin of 1889, which established that triple joint control; and it finds that the action of the two Powers without the concurrence of the third was not warranted by the treaty, which provided against any of them exercising separate control over the islands or their government, (although it was taken in favour of the successor in whose favour the Chief Justice of Samoa had decided); and that the military measures were not justified by necessity for the common safety. Great Britain and the United States are consequently held liable for the losses caused thereby, reserving for future decision to ascertain the extent of such liability.

South Africa.

The announcement by Mr. Chamberlain that the British Government definitely accepts full responsibility for the receipts given during the recent war by British officers is in accordance with general practice. It has been pointed out (*International Law Association, Rouen Conference Report* 1900, p. 68) that a welcome addition to the provisions of the Hague Convention on this point, which only provide for giving receipts for contributions in kind made to invading forces, if not paid for in cash, would be the formulation of some certain method for securing repayment of what the giving of receipts acknowledges are debts on the part of their governments; and it was suggested that special commissions should be charged with the duty of redeeming all such receipts on the part of the government whose officers give them.

An equally correct course is foreshadowed with regard to the attitude of our Government towards the shareholders in the Netherlands Railway Company in the Transvaal, which is welcome after the adverse report of the Commission which investigated the various Transvaal commercial concessions on behalf of the Government.[1] At a recent meeting of the shareholders it was announced that the British Government offers payment in full for the bonds, and a considerable sum for the ordinary shares which were in the hands of neutrals prior to the war. This will be a valuable precedent for the future treatment of British interests in foreign countries under the like circumstances. It is also announced that our Government may take action in foreign courts to attach money sent from the Transvaal to its former officials in Europe; and no doubt they will be no less ready than British courts have shown themselves in similar circumstances to recognise the title of the new Government to the property of the old.

[1] See this Magazine, Vol. XXVII, p. 484, (August, 1901).

What are War Ships?

The British protest against the leave given by the Turkish Government to some Russian torpedo boats to pass through the Dardanelles, even though disarmed and sailing under the commercial flag, as a breach of the treaties of Paris and London in 1856 and 1871, is not uncalled for, when it is remembered that similar acts, namely, the admission of ships of war into the Straits and their entry into the Black Sea, were utilised by Russia in 1870 to declare herself no longer bound by the clauses of the treaty of 1856 declaring the neutrality of the Black Sea, and to obtain their abrogation in the subsequent treaty. Both treaties, while declaring on behalf of Turkey that foreign ships of war will be prohibited from passing the Straits while the Porte is at peace, reserves to Turkey the right to deliver firmans for the passage of light vessels under the flag of war employed in the service of the foreign legations, and also the right to open the Straits in time of peace to ships of war of the allied Powers, in cases where the Porte may think it necessary for safeguarding the stipulations of the treaty of 1856. It has been suggested that these vessels were not ships of war in the state in which they passed through; but unless Turkey had so considered them, it is clear that no leave would have been necessary. The phrase "ships of war" certainly implies something more than armed public ships, and seems to cover all public ships, armed or unarmed. In *The Parlement Belge* (5 P. D. 194) considerable discussion took place as to what were public ships, and as to the effect of a postal convention between Great Britain declaring that ships belonging to the Belgian Government carrying mails should be treated as ships of war in British waters. No decision was given on the effect of this convention: as judgment went on the wider ground that as the property of a sovereign such vessels were exempt from civil process, the test being said to be not "so much

armament as commission," and rather the public than the military character of the ship. Vessels of the Russian volunteer fleet, on the other hand, would not fall under this category, although their chief officers hold commissions from their sovereign, their crews are under naval discipline, and they are employed in public service only, because they are private property. The only object of the present protest is to take note of what may be a precedent for any other nation, party to these treaties, wishing to do the same.

Service out of the Jurisdiction.

A recent decision of the Court of Appeal (*The Duc d'Aumale*, Dec. 2)—a case where a collision had taken place in the English Channel between an English ship and a French ship in tow of a tug, for which the former ship had sued the tug here, and then sought to bring in the owners of the French ship as "necessary and proper parties to the action properly brought against another person duly served within the jurisdiction" (R. S. C., Order XI, 21 [*g*])—seems to go further in the direction of claiming jurisdiction over foreigners than the previous decisions. It has been judicially established that there is such a power in cases of tort (in both the reported instances the tort being committed within British jurisdiction) after previous contrary opinions: but that this is a discretionary power requiring great care in its exercise. It is noteworthy that a Rule of Court was made in 1893, specifically allowing such service out of the jurisdiction in cases of torts committed within it, but this provision disappeared very shortly afterwards. Tests which have been suggested for judging of its propriety are, whether if both the defendants had been resident within the jurisdiction they would both have been sued: and whether its exercise is *bonâ fide*, for the party resident within the jurisdiction, must not be used merely as a means to getting at the other. Such an authority as Lord Esher has stated that it

seems an anomaly that, though a person cannot be served out of the jurisdiction if he were sued alone, yet he can be so served by reason of the plaintiff suing another person in the jurisdiction, and then declaring that he is a proper party to the action. The present Lord Chancellor has described the rule of service out of the jurisdiction as a "somewhat artificial provision which is apparently intended to extend the power of suit by persons in this country against persons in foreign countries," and a "limited and exceptional power;" and Lord Shand has pointed out the "inexpediency of seeking to extend these rules which admit of service out of this country on persons domiciled in a foreign country, against whom the courts of this country have no jurisdiction," and doubted "whether in the absence of any special treaty the courts of a foreign State would feel bound to give effect to decrees so obtained under the rule, even in its present form (Rule 1 [e]), which seems to violate the general principle *actor sequitur forum rei*" (*Comber* v. *Leyland*, L. R. [1898], A. C. 524: and see *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, L. R. [1894], A. C. 670). Perhaps as cogent a consideration as any is, that if judgment be given against the third party it may have no effect on him if he has no property then or subsequently within the jurisdiction.

G. G. PHILLIMORE.

VIII.—NOTES ON RECENT CASES (ENGLISH).

THE case of *Aflalo* v. *Lawrence & Bullen, Limited* (L. R. [1902], 1 Ch. 264), on which we commented in our issue of last May (at p. 346), has now been heard by the Court of Appeal. The Court (Vaughan Williams, L.J., dissenting) has affirmed the judgment of Joyce, J. The decision has not yet been reported, but we may say that while Romer & Stirling, L.JJ., followed Joyce, J., Vaughan

Williams, L.J., delivered a most able dissenting judgment, based on the very ground we set out when we questioned the judgment of Joyce, J., namely, that when a person employs another to write an article for him and pays him for doing so, the natural inference is, that the intention of both parties is that the article shall belong to the employer. We reserve further comment until a report of the case appears.

In *Janson* v. *Driefontein Consolidated Mines, Limited* (L.R. [1902], A. C. 484), the House of Lords has affirmed the decision of the Court of Appeal, and the judgment of Mathew, J. The appellant, an underwriter, had insured gold of the respondents—a Transvaal company—before the outbreak of the war, against "arrests, restraints and detainments of all kings, princes and people" during its transit home from the Transvaal. When war was impending, the gold was seized by the Transvaal Government and used by it for the purposes of the war. Mathew, J., held that as war had not actually broken out when the seizure was made, the respondents, though a Transvaal corporation, were entitled after the war was over to sue the respondents under this policy for the loss their own government had thus inflicted upon them, and this decision is now unanimously affirmed by the House of Lords. Lord Macnaghten, in a short but brilliant judgment, put the point in a nutshell: "The law recognizes a state of peace and a state of war, but it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war." It was just this intermediate state, what the Lord Chancellor might call "a sort of state of war," on which counsel for the respondent relied.

The legislature is not always happy in expressing its meaning, as we all unfortunately are too well aware. This seems to be the case as regards the recent Companies Act

1900. In *Hilder* v. *Dexter* (L.R. [1902], A.C. 475), Byrne, J., held that sect. 8 (2) prohibited a company offering subscribers for shares an option to take up subsequently other shares at par. This decision was unanimously affirmed by the Court of Appeal (Rigby, Collins & Romer, L.JJ.). And now the decision of the Court of Appeal has been unanimously reversed by the House of Lords (Halsbury, L.C., Davey, Robertson & Brampton); Lord Halsbury refraining from doing more than expressing his acquiescence in the judgments of the other learned Lords, on the ground that, as he was responsible for the language of the Act, he felt he was peculiarly liable to read into that language the meaning he intended it to bear. That is also a good ground for leaving his view out, in considering the balance of judicial opinion as to the real meaning of the words. Doing so, we have Rigby, Vaughan Williams and Stirling, L.JJ., and Farwell, J. (for Byrne, J., and the Court of Appeal based their decision on that of Farwell, J., and the Court of Appeal in *Burrows* v. *Matabele Gold Reefs and Estate Co. Ltd.* (L. R. [1901], 2 Ch. 23)), holding that the words of the sub-section mean one thing, and Lords Davey, Robertson & Brampton holding that they mean something quite different. When high judicial opinion is so evenly balanced it would not become us to express any view on the matter. One thing, however, is evident: that, as the Lord Chancellor takes the responsibility for the language of the sub-section, we cannot altogether congratulate him on his skill as a draftsman.

At first sight it seems a little strange that it has only now been decided for the first time, that the rule against double possibilities does not apply to limitations of personal estate. Perhaps the reason of this is, that heretofore it never occurred to anybody to imagine that it did. That real estate could not be limited to the unborn child of an unborn person was a rule of the old Common law and is still in force

(*Whitby* v. *Mitchell*, L. R., 44 Ch. D. 85). But it was never recognised in equity. It did not apply even to the equitable estate in freeholds (*Cattlin* v. *Brown*, 11 Hare 372). Why it should be thought that it could apply to future interests in personalty, which could not be limited at all at Common law and which were absolutely the creation of equity, is hard to understand. However, the point, such as it is, is now settled by *Re Bowles, Amedroz* v. *Bowles*, L. R. [1902], 2 Ch. 650.

A matter which may yet require the attention of the Legislature was touched upon in *Jeremiah Ambler & Sons, Ltd.*, v. *Bradford Corporation* (L. R. [1902], 2 Ch. 585). The Bradford Corporation had obtained Parliamentary powers to manufacture electricity for the town of Bradford. In connection with this manufacture they constructed certain works which, the plaintiffs alleged,—wrongly as the Court found,—caused them injury. On the dismissal of the action, the defendants claimed that they were entitled, under the Public Authorities Protection Act 1893, to costs, as between solicitor and client. Joyce, J., refused to give them these, but the Court of Appeal has reversed his decision. Very likely this reversal was correct. But it is very doubtful whether Parliament intended when it passed that Act to put municipal corporations, who are in effect carrying on a trade, in a privileged position as compared with other traders. This may become very important if the present tendency of corporations to take over the administration of all sorts of works in their boroughs continues. Another rule applicable to local authorities—that they are liable only for misfeasance, not for nonfeasance—will then also have to be looked into. Not long ago a local authority endeavoured, under this principle, to escape liability for an accident due to the defective state of a tramline in their district. Happily, however, in that particular case, they failed (see *Barnett* v.

Poplar Borough, L. R. [1901], 2 K. B. 319). But the rule, unless carefully guarded against, may obviously result in gross injustice to individuals when municipal corporations are not merely local governing authorities but also monster manufacturing and trading concerns.

Another action to which the Bradford Corporation were party is interesting; *Bradford Corporation* v. *Jerrard* (L. R. [1902], 2 Ch. 655). It decides that no right of action lies for abstracting underground water from your own land, even when such water runs in a defined channel, except where the course of such channel is known or can be ascertained without excavation. The point was never before decided here, though it has been in Ireland (*Ewart* v. *Belfast Poor Law Guardians* (9 Ir. R. 194)), and it is well to remember it, as the rule regarding underground water is often stated in a misleading way.

The parties in *Re Lawley, Zaisar* v. *Lawley* (L. R. [1902], 2 Ch. 673, 799) can scarcely complain of the law's delay. The case was heard by Joyce, J., on 29th July, and his decision was affirmed by the Court of Appeal on 30th October. Seeing that the long vacation intervened this seems fairly speedy justice.

J. A. S.

Tolhurst v. *The Associated Portland Cement Manufacturers* (1900) *Limited—The same Company and the Imperial Portland Cement Co. Limited* v. *Tolhurst* (L. R. [1902], 2 K. B. 660; 87 L. T. R. 465)—furnish a good illustration of the vitality of a contract. The facts of the case can be briefly stated. A landowner agreed to supply on credit at a fixed price per unit for a long term of years, and a limited liability company agreed to take a minimum number of tons of chalk

per week, "and so much more as the Company might require for its whole manufacture of cement," on a defined piece of ground. Shortly afterwards the Company went into voluntary liquidation and distributed all its assets, having previously assigned the contract to another company, who proceeded with the cement business on the same piece of ground. The question arose whether, as the liquidated Company had assigned what was unassignable and had reduced itself to a mere unsubstantial name, the contract could be enforced against the landowner. In one respect, at any rate, it would appear that he would be prejudiced by the subsistence of the contract after the assignment, for though a supply to the full requirement of the works would continue to be an obligation upon him so long as it was profitable to the operating Company to have it enforced, yet if the market rate fell below the contract price he would have no remedy against this Company if it chose to ignore the contract altogether; and against the liquidated Company he could only obtain a judgment which would be fruitless. But the Court (Collins, M.R., and Cozens-Hardy, L.J.) held on conclusive reasoning that, so long as the original Company was not dissolved, the contract was unbroken either by the assignment or the liquidation, in the absence of evidence of repudiation or breach; for, though a contract in which there are mutual obligations cannot be assigned in the sense of discharging the original contractee and creating privity with a substituted person, yet, when it is not special or personal, one of the parties may rely on performance by another as performance by himself, and, as the obligation upon the original Company was merely a money payment, cash could be paid over by one company as well as by the other. Even if, instead of a voluntary liquidation of the original Company, the Company had been insolvent, the contract would have survived, with the simple variation that the landowner

might have demanded cash payments. Sect. 157 of the Companies Act 1862, and sect. 25 of the Judicature Act 1873, *do not render assignable*, contracts which before the Acts were incapable of assignment.

The case of *The Corporation of Sheffield* v. *Barclay and others* (L. R. [1903], 1 K. B. 1; 87 L. T. R. 479; 72 L. J. R., K. B. 8); is one of much interest to the Stock Exchange, and to all who buy securities in the nature of stocks and shares. In 1893 Sheffield Corporation Stock held by two trustees was, in the ordinary course of business, transferred to a partner in Messrs. Barclay and Co. as representing the firm, and was registered in his name. In the same year the stock was sold to other persons, who were in turn registered as the holders, and to whom certificates were issued by the Corporation. In 1900 the discovery was made that one of the trustees had forged the signature of his co-trustee to the first transfer. The Corporation thereupon claimed indemnity from Messrs. Barclay, and at the late Michaelmas sittings the Lord Chief Justice decided in favour of the Corporation. As notice of appeal has been given, it would not be well to do more than just to indicate the chief points made at the trial. The Corporation claimed that the sending in of the transfer, which turned out to be forged, implied an undertaking of indemnity and a warranty by Messrs. Barclay that they had the authority of the transferors, and that the Corporation, in doing a lawful act at the request of Messrs. Barclay, had suffered damage. This was supported by the judgment of Tindal, C.J., in *Toplis* v. *Grane* (5 Bing. N. C. 636), approved by Lord Esher in *Dugdale v. Lovering* (L. R., 10 C. P. 196), that a person was bound to indemnify another whom he had directed to do a lawful act which being done had occasioned injury to the rights of a third person. On behalf of Messrs. Barclay, the judgment was cited of Lord

Lindley (then Lindley, J.), in *Simm* v. *Anglo-American Telegraph Co.* (5 Q. B. D. 188), to the effect that a duty is cast upon a company to look after its register and the transfers, and that just as a banker who pays a forged cheque has to suffer the loss, so should a company which registers a forged transfer. On the other hand, a contrary opinion of Bramwell, L.J. (5 Q. B. D. 203), was urged.

In *Stuart* v. *Freeman* (L. R. [1903], 1 K. B. 47; 87 L.T.R. 516; 72 L. J. R., K. B. 1); the Court dissented from dicta of the Judges in *Pritchard* v. *the Merchants' Life Assurance Society* (3 C. B., N. S., 622), decided in 1858, in which case Sir J. S. Willes, in dealing with the question (pages 642 and 643) whether the effect of a provision in a life policy that the policy "should become void if the premiums be not paid within 30 days after they become due," was "that if the assured should die within 30 days the Company are still bound to accept the money, such payment to all intents and purposes enuring as a payment within the time limited by the policy, so as to entitle the representatives of the assured to recover upon the policy, even though the assured should be dead at the time the premium was paid," said that "the inclination of his opinion" was "that the 30 days are given only with reference to insurance for future years." On this point Mathew, L.J., says, in *Stuart* v. *Freeman*, "I find myself unable to agree with the dicta . . . that allowing days of grace means only that during those days there was to be a continuing offer to renew the policy, and that unless that offer was accepted and payment made while the life was in existence the policy was void." In *Stuart* v. *Freeman* no question as to revival of the policy was involved, as the policy was for one year with liberty to pay the premiums in quarterly instalments, on condition that the policy should be void if at the death of the assured any instalment should be in arrear beyond the days of grace. A premium due was

paid within the days of grace, but actually after the death of the assured, though the fact of the death was at the time unknown to the parties; and it was held that the policy did not lapse.

T. J. B.

IRISH CASES.

A novel point under the Workmen's Compensation Act 1897 was decided—with considerable conflict of judicial opinion—in *Beckley* v. *Scott & Co.* ([1902], 2 Ir. R. 504). A workman sustained injuries in the course of his employment at dangerous sawing machinery, under circumstances which, it may be assumed, gave him a common-law right of action against his employer. He proceeded first by way of a claim for compensation under the Act. The County Court Judge held, as the law then stood, under *Lysons* v. *Knowles* ([1900], 1 Q. B. 780), and *Stuart* v. *Nixon* ([1900], 2 Q. B. 95), that in order to obtain the benefit of the Act a workman must have been at least two weeks in the service of the employer against whom the claim was made; and as this condition was not fulfilled in the present case, he dismissed the claim. Subsequently, the authorities referred to were over-ruled by the House of Lords ([1901], A. C. 79). The workman then, instead of proceeding under the Act, instituted an ordinary action in the High Court against the employer for damages in respect of the same injuries. The judge before whom that action came for trial non-suited the plaintiff, holding that he had exercised once for all the option given him by the Act of 1897. A majority of the Divisional Court reversed the non-suit and ordered a new trial: and this reversal was upheld by a majority of the Court of Appeal. The question turns on the construction of sect. 1, sub-sect. 2 (*b*), of the Workmen's Compensation Act, which, after a saving of the employer's personal liability in cases

where he would have been liable before the Act, continues: "but in that case the workman may *at his option* either claim compensation under this Act," or take the same proceedings as were open to him before the Act; providing, however, that the employer shall not be liable to pay compensation both independently of and under the Act. What is the exact nature of this option given to a workman by this sub-section, and what will take away his common-law right of action? *Edwards* v. *Godfrey* ([1899], 2 Q. B. 333) was the converse case to the present. There a workman had first sued his employer in an ordinary action for negligence, and failed on the ground of contributory negligence. He did not apply, as he apparently might have done, under sub-sect. 4 of sect. 1, to have compensation assessed in that action, but at a later date proceeded in the County Court under the Act; and it was held in the Court of Appeal that it was not competent to him so to proceed. That decision might be supported on the ground that his option was exercised, at all events, when he did not apply, even in his common-law action, to have compensation assessed; but the Court of Appeal and the Divisional Court thought that it did not rule the present case. They were of opinion, although doubtfully, that a mere claim for compensation under the Act, which failed on grounds peculiar to the Act, did not of itself remove the employer's common-law liability where such existed. Possibly they were somewhat influenced by the fact that the claim had failed by reason of a decision which, although correct when it was given, was afterwards by the effect of the decision in the House of Lords made incorrect. Would a mere mistake, it was asked, in a workman's view of some of the numerous technicalities under the Act, leading him to institute proceedings under the Act which turned out to be unfounded—a mistake as to the artificial meanings of "factory" or "undertakers," for

example—necessarily deprive him of what must be assumed to be a valid right of action at common law? The proviso at the end of sub-sect. 2 (*b*), in expressly enacting that an employer shall not be made liable to pay twice over, seems to contemplate the possibility of a double claim. True, there are the puzzling words as to the workman's "option," and the greater puzzle as to what is a final exercise of this option. Here is the decision that an unsuccessful claim under the Act is not necessarily an exercise of the option. It may, however, be pointed out that there are very few ways in which a claim under the Act could become unsuccessful, which would not also involve a complete defence to a common-law action. But in view of the fluctuation in decisions on this branch of the law, this same set of facts is not at all unlikely to recur. The case, of course, gives rise again to the familiar condemnation of the Act as ill-drawn. The law is, in fact, being settled slowly and unsatisfactorily at the expense of trades unions and insurance companies. In another two or three years matters will be ripe for an amending and (it is to be hoped) a codifying Act. When it comes, one can only trust that it will repeal the Employers' Liability Act, the Act of 1897, and the doctrine of common employment, and thus have some chance of putting the law on a satisfactory basis.

What is the exact nature of the interest which one of the next-of-kin of a deceased intestate has in the personalty of the deceased before administration? Or has he indeed anything that can be called a legal interest? And if he has, is it sufficiently definite to be assignable, at least to the extent of enabling the assignee to institute proceedings for administration? These questions arose, by no means for the first time, in *Tevlin* v. *Gilsenan* ([1902], 1 Ir. R. 514); and that case has settled it that, for Ireland at all events, the answer to the last two questions is broadly in the affirmative.

They arose in this way. The Irish Judgment Mortgage Acts allow a judgment creditor to register his judgment, in a particular way, against any interest in lands which his judgment creditor has: and the effect of such registration is the same as if the judgment debtor had mortgaged the interest in question to the creditor by deed. The judgment-debtor in this case was one of the next-of-kin of a deceased intestate who was at his death owner of a chattel real. The creditor had registered his judgment against this alleged interest. No administration had been taken out, and the creditor instituted proceedings in the Chancery Division for administration of the estate. If he was to succeed, it was obviously necessary to hold that the individual next-of-kin had before administration a legal interest in the assets capable of being assigned. The Vice-Chancellor held that they had not, but the Court of Appeal reversed the decision. The question is not free from difficulty, owing largely to a conflict between two decisions of the House of Lords—*Cooper* v. *Cooper* (L. R., 7 H. L. 53), and *Sudeley* v. *Attorney-General* ([1897], A. C. 11). *Cooper* v. *Cooper* turned on a question of election: could a person be put to his election between a specific benefit under a will, and an interest as one of the next-of-kin in the unadministered personalty of an intestate? It was held that he could: and as election can only take place between what Fitzgibbon, L.J., called "definite tangible objects of choice" (although the epithet "tangible" is not very happy), this involved the decision that the last-mentioned interest was a legal interest. This seems a net authority on the point: but some doubt was indirectly cast upon it by the language of certain of the learned Lords who decided *Sudeley's Case*. The question there was, whether probate duty was payable in England in respect of debts secured by a mortgage of lands in New Zealand. A. died a domiciled Englishman,

owner of these mortgage debts; he devised the mortgage in trust to pay the income to his wife for life, and gave one-fourth of the *corpus* to her absolutely. She died before the mortgage was realized, and before an appropriation had been made of any portion thereof to her particular share. On her death, the Crown claimed probate duty on her one-fourth share. The principle of the decision was, that her representatives had no right except that of suing the husband's representatives: that that right was an English right: and it was added that she had no interest in the mortgage: "she had no right of property in, or right to claim any portion of the mortgages *in specie*."

There is an apparently irreconcilable conflict in the decisions of the Lords, and the Court of Appeal preferred to follow *Cooper* v. *Cooper*. Irish authority on the point had also varied. *Herbert* v. *Rae* (Ir. R., 9 C. L. 539) had decided that one of the next-of-kin of a deceased lessee could not maintain an application for restitution after an ejectment by the lessor, on the express ground that "he has no interest in the lease": but there are, later, franchise cases in which the interest of such a next-of-kin had been allowed to qualify him for a vote. On principle, there seems no very valid reason why our law should not recognize the possibility of legal ownership in an undivided share of a *hereditas*. A legatee is the legal owner of his legacy before administration: and what is intestate succession under the Statute of Distributions, but the recognition of a statutory will?

In these days of adulteration and ptomaine poisoning it is some little comfort to know that if one buys food from a shopkeeper on the express or implied understanding that one wants to eat it, and leaves the selection to him, the implied warranty of quality under sect. 14 (1) of the Sale of Goods Act 1893 arises. The viand bought in *Wallis* v. *Russell* ([1902], 2 Ir. R. 585) was the humble boiled crab,

which turned out bad, and caused an old lady's quiet tea-party to be the prelude to six weeks' illness. It was contended for the defendant that the section only applied to manufactured goods, from the use of the words "whether he (the seller) be the manufacturer or not." The Court, however, had little difficulty in rejecting this ingenious restriction of the section. Another argument upon the words "for a particular purpose," and the suggestion that use for food is not a particular but a general purpose, met with just as little success. The sale of provisions, therefore, in this respect stands upon the same footing as the sale of any other goods. Indeed it appears that, in the early days of the Common law, the implied warranty on the sale of provisions was stricter than in the case of other goods. Incidentally, it may also be noted that sect. 14 of the Sale of Goods Act has made a slight change in the law: previously, *Jones* v. *Just* (L. R., 3 Q. B. 197) had laid it down that "when goods are *in esse*, and *may be* inspected by the buyer, and there is no fraud, the rule of *caveat emptor* applies even to latent defects." Fraud and negligence were alike out of the present case, but nothing will now protect a seller except *actual* inspection: the opportunity of inspecting is not enough. And therefore, apparently, this implied warranty could never be excluded in the case of provisions having defects indiscoverable to ordinary sight.

J. S. B.

SCOTCH CASES.

Scotsmen are proud of Abbotsford with its biographical and historical memories and associations. Visitors carry away with them pleasing recollections of the arrangements made by the present proprietors for the gratification of the public interest, but they do not expect to find these set forth in the pages of the law reports. Yet such is the result of

Maxwell Scott v. *The Assessor for Roxburghshire* ([1902], 39 Sc. L. Rep. 852), which was an appeal against the valuation of certain rights reserved to the proprietors in connection with a lease of Abbotsford Mansion House and shootings. The reserved rights, the valuation of which was in dispute, included a right of access to, and to keep open and show to visitors, tourists and others, during week-days from 1st March to 15th October, the rooms in the mansion house known as Sir Walter Scott's library, drawing-room, study, armoury and hall, with access by the present entrance and staircase in the east side of the mansion house, and from the public road by a pathway. The Valuation Appeal Court over-ruled the decision of the lower Court, and were of opinion that they could not consistently with former judgments take into account, directly or indirectly, any revenue derived by the proprietors in connection with the admission of visitors, nor could they consider the proprietor's reserved right of access to the house or certain parts of it as a heritable subject separable from the house.

In *M'Innes* v. *Ayr Harbour Trustees* ([1902], 40 Sc. L. Rep. 24), we have an incidental illustration of contribution among wrongdoers in regard to which the law of Scotland differs materially from that of England. The immediate question was as to the power of a jury to apportion the damages payable by each of two entirely separate wrong-doers, and the result was made to depend upon the form of the issue placed before the jury. There were three separate actions arising out of the fall of a derrick in Ayr Harbour by which a man was killed. The first was at the instance of the deceased's widow against a shipping company concluding for £1,000 of damages; the second was a supplementary action, at the instance of the same person, against the Ayr Harbour Trustees concluding for £1,000. The third action was at the instance of the deceased's

mother against the two defenders, jointly and severally, concluding for £500. All the actions were conjoined by the Lord Ordinary and were tried together. In the two actions at the instance of the widow the jury assessed the damages at £225, and apportioned two-thirds thereof as payable by the Trustees of Ayr Harbour and one-third as payable by the shipping company. This apportionment was sustained in respect that each defender was originally sued separately, and the issue claimed a separate specified sum from each. In the action at the instance of the mother the jury assessed the damages at £110, and "if they can competently do so" they apportioned the amount into two-thirds and one-third as in the other case. This the Court held to be incompetent in respect that there was only one conclusion for a single sum to be paid by both defenders jointly and severally. The Court, however, held that the attempted apportionment did not invalidate the award, and applied the verdict by decerning against both defenders, jointly and severally, for payment of £110.

The result in the case of the joint and several decerniture, will not work out as the jury evidently intended that it should do. Instead of being payable in the proportion of two-thirds by the Harbour Trustees and one-third by the shipping company, each of these parties will be required to contribute one-half of the total amount. It is here also that the distinctive difference between the law of England and that of Scotland appears. If, under the pressure of diligence, one of the parties is obliged to pay the whole amount, he would in England have no recourse for contribution against the other wrong-doer (*Merryweather* v. *Nixon* [1799], T. R. 186), whereas in Scotland he would be entitled to relief against the other wrong-doer to the extent of one-half (*Palmer* v. *Wick Steam Shipping Company* [1894], 21 Ret. H. L. 39). In the latter case Lord Chancellor Herschell, speaking of the English rule of *Merryweather* v.

Nixon, said "It is now too late to question that decision in this country, but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries."

A company carrying on business as paper manufacturers in Aberdeenshire were approached by a fire insurance company, who offered to accept their fire risk at the same rate as they were paying to other offices. After some correspondence, the paper company agreed to give the business, and they consequently received a policy for £5,000. Upon examining this policy the insured became aware, for the first time, of certain conditions to which they objected. Chief among these, was a provision that every person accepting a policy became a member of the insuring company and liable, to a certain extent, to contribute to the assets in the event of the company being wound up. No indication of such a condition had been given in the correspondence prior to the issue of the policy. In an action by the insurance company for the premium, both Sheriff-Substitute and Sheriff-Principal gave judgment against the defenders, but the Court of Session reversed. The Lord Justice-Clerk said that "the defenders found to their astonishment that the policy which they had asked for was made out in their favour on condition of their becoming members of a limited liability company. They were under no obligation to this effect and were entitled to declare the whole matter to be off. There was no *consensus in idem placitum*." (*Davidson & Sons, Ltd.*, v. *Star Fire Insurance Co., Ltd.*, [1902], 40 Sc. L. Rep., 26).

R. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Elements of Contract. By A. T. CARTER. London: Sweet & Maxwell. 1902.

We have here an excellent book for those who are beginning to read law. It deals in a very lucid manner with the most important essentials of contracts, and illustrates its statements with well-selected cases. There are some good little summaries of the law on particular points, and a chapter on Mercantile documents is likely to be particularly helpful to many students to whom such things as "bills of lading," "bills of exchange," etc., have been mere names.

The Annual Practice, 1903. By THOMAS SNOW, M.A., CHARLES BURNEY, and FRANCIS STRINGER. 2 Vols. in one. London: Stevens & Sons. 1903.

The Yearly Practice of the Supreme Court, 1903. By M. MUIR MACKENZIE, S. G. LUSHINGTON, M.A., B.C.L., and JOHN CHARLES FOX, assisted by A. C. MCBARNET and ARCHIBALD READ. London: Butterworth & Co. 1903.

Though these hardy Annuals are very similar in outward form there is a difference in their inward arrangements, as the *Annual Practice*, though appearing to be but a single volume, really consists of two volumes bound as one. It is also larger in bulk though printed on thinner paper than its rival. We will not attempt to make any other comparisons between them. Their previous records, and the names of the gentlemen who edit them are sufficient to speak for their merits. One or other of them every practising barrister must have, and the arrangement and style of one will appeal to one taste, while another mind will prefer the other. If anybody is so very particular that he cannot make up his mind which he likes best, the safer plan will be to get them both. The labours of Editors and their contributors have been rather heavier this year than usual. Important rules have been issued during the past year; one set amalgamating the Chancery and other Taxing Offices with the Central Office; and a more important set making a number of Orders

as to pleading and other matters of practice. This, as might have been expected, has compelled the revising and re-writing of many of the notes. Perhaps the most interesting of the new rules is the one which abolishes Local Venue, and renders useless much learning. We need scarcely say alterations have been made in Order XXX, and all who are concerned with that simple Order will do well to read the notes Mr. Stringer has re-written on that subject.

Memoirs of Paul Kruger. Translated by T. DE MATTOS. London: T. Fisher Unwin. 1902.

The four times President of the South African Republic, according to *T. P's Weekly*, has produced a book which "will have great value for the historian to-morrow." We doubt it very much, as history to be of any value should be founded on facts. The *Daily News* declares that "Mr. Kruger's story bears the stamp of absolute sincerity," and in this we agree—sincerity in its bitterness against everything English. As to its truthfulness, we believe many inaccuracies have already been exposed.

The Law of Land. By H. S. THEOBALD, M.A., K.C. London: Wm. Clowes & Sons. 1902.

Mr. Theobald has been rather at a loss what to call this book, and does not seem to be satisfied with the title he has chosen, and although he has added to it "including natural and acquired rights and the rights and obligations arising out of the use and enjoyment of land," these additional words make the title—as he himself says—"diffuse without being exhaustive." The point of view from which he writes is best described in his own words, "to take a person, who is the owner of land, and to enquire what are his rights and obligations, what use can he make of his land, how far are his rights affected by those of his neighbours." It does not deal with tenure, conveyancing, or the law of landlord and tenant. The whole scheme is admirably carried out. The arrangement is good, the statements of law are clear, concise, and supported by a judicious selection of authorities. When the law is not settled it is pointed out, and in several instances it is suggested that the authority of well-known cases is doubtful. A very useful comment which he makes on more than one branch of law is, that the law is plain but the difficulty generally lies in the facts. This is particularly applicable to cases of

nuisance, and encouragement of outlay by a stranger on land. There is an interesting statement as to the law of salvage or "money laid out for the preservation of property," and the differences in the decisions in England and Ireland. There is much useful information connected with sporting rights; and it is curious to notice how many points are not yet settled; such as how far the right of a riparian owner to fish extends; whether a landowner may frighten his neighbour's game by action on his own land; and whether, if a pheasant killed on one man's land falls on his neighbour's land, the former may go to pick it up. There is a useful note to remember in reading Equity cases. "The Chancery judges have never been assisted by a jury. They are judges of fact as well as of law. The two are not kept apart as they are in a trial by jury. Consequently there may be differences of opinion as to the true meaning of the facts." We may call attention, in concluding, to Mr. Theobald's criticism on cases. He doubts *Pretty* v. *Bickmore* and *Gwinnell* v. *Eamer*, and some of the other cases of coalplates in highway, where it has been held that the landlord ceases to be liable if he throws the liability to repair on the tenant. On the question of liability for misfeasance, he holds that *Holliday* v. *St. Leonard's, Shoreditch*, and *Taylor* v. *Greenhalgh*, are no longer law. There are some valuable comments on the *Saltash Case*, and an acute dissertation on the familiar case of *Wood* v. *Leadbitter*. Although we agree with much of his criticism of that case, which always strikes one as unsatisfactory, we are afraid that the law there laid down has been established so long that it would probably not be over-ruled by the Court of Appeal now. Mr. Theobald's opinion of the effect of the Judicature Acts, as regards law and equity, is that "the so-called fusion is no more than a mechanical juxtaposition of the two systems."

Notable Middle Templars. By JOHN HUTCHINSON. London: Honourable Society of the Middle Temple. 1902.

Mr. Hutchinson, by indefatigable research and much learning, has produced a most interesting catalogue of the Worthies of his Inn. That the Middle Temple has produced a great number of great Judges and lawyers we all know, but we must confess it is a surprise to us to see in how many varied walks of life its members have distinguished themselves. For instance, we might expect many Lord Chancellors, and amongst others we find Somers, Hardwicke, Eldon, Westbury and Cairns, but we do not expect Bishops like

Buckeridge, Lyttelton, Trelawny and Sherlock. There are Chief Justices as Tenterden, Cockburn and Russell, but also great sailors like Drake, Frobisher and Hawkins. We are prepared to meet the names of great jurists, from Plowden to Maine, but do not remember so well that the Inn also numbers amongst its members the great novelists Dickens, Thackeray and Trollope. We find numerous Speakers and some prominent statesmen and orators, namely, Halifax, Harley, Grattan and Burke. The drama has always been dear to Templars, so it will not be a surprise to find, amongst others, the names of Ford, Congreve, Sheridan, and H. J. Byron. Some of the members took to commercial pursuits and became Lord Mayors; and there are many antiquarians, a few heraldic writers, very many journalists, among whose names figures prominently that of Delane. In fact, there is hardly any profession or pursuit to which the Middle Templars have not taken, and they even number in their roll the names of two Venetian Ambassadors.

The Law and Practice of a Case Stated. By A. C. FORSTER BOULTON. London: Butterworth & Co. 1902. Mr. Boulton has done a service to the profession in this little book on the mode of appeal from a Court of Summary Jurisdiction by means of a case stated. He has collected, and arranged with judicious comments, full information on this particular form of proceeding. Although, considering the difficulty of some of the questions involved, including that of the primary question what is a Court of Summary Jurisdiction, we are afraid he is a little too sanguine in his hope that his book will enable "the most inexperienced Practitioner" to avoid mistakes, yet we have no doubt it will materially help both the aforesaid practitioner, and others. There is a useful and suggestive chapter on "Law and Fact."

Contract of Sale of Goods. By WILLIAM WILLIS, K.C. London: Stevens and Haynes. 1902. Judge Willis is an accurate and learned lawyer, and all he does he does thoroughly. This book contains the substance of six lectures delivered in the Hall of Lincoln's Inn in June 1901, with the object "to facilitate the study of the provisions of the Sale of Goods Act 1893." They convey much solid information in a lively and impressive style, and range over the subject from "Definition of Contract of Sale" to "Stoppage in Transitu." They do not show very much respect for the

Codifying Statute, and discuss and criticise decisions, without fear or favour. Interspersed we find many characteristic remarks, such as, "Never have, if possible, any doubt. The last man I respect is the man of doubts. We do not come into the world to have doubts, but to become certain." "You will never reform anything in England unless you have a sort of volcanic action," and in his concluding lecture, "The law relating to the sale of goods is a very serious and solemn subject."

The Acts relating to the Supply of Gas and Water by Companies and Local Authorities. Compiled by JOSEPH REESON. London: Butterworth & Co. 1902.

Mr. Reeson is thoroughly qualified, by his professional experience with the Gas Light and Coke Co., to prepare this most useful compilation. It does not purport to be written for lawyers, but for "use and ready reference in the ordinary course of business." It does not therefore "deal with legal views, interpretations, or decisions." It is, however, calculated to be of great use to lawyers, as it contains all the general enactments in force *in all parts* of the United Kingdom, relating not only to the supply of gas and water, but numerous other subjects intimately connected therewith, also private Acts of Gas Companies and rules, regulations and bye-laws. Though no decisions are given, the sections of the Acts are elaborately annotated with reference to other Acts which repeal, amend, or explain them. Another remarkable and valuable feature of the book is that it contains three Tables of Contents. The first is chronological; the second alphabetical; the third subject-matter. The general Acts begin with the Metropolitan Paving Act 1817, and go down to the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901. There is provided a very complete and exhaustive Index of more than 200 pages, and we hope with confidence that the great labour and care which must have been bestowed on the carrying out of this work will be adequately rewarded.

The Private Street Works Act 1892. By JOSHUA SCHOLEFIELD and GERARD R. HILL, M.A. London: Butterworth & Co. 1902.

As increased powers in respect of Private Street Works have been conferred on Local Authorities, it is very advisable for all who may

have to advise either them, or the landowners whose property they may seek to affect, to have a means of ascertaining the law on the subject. This means Messrs. Scholefield and Hill have provided in the present work. They begin by pointing out the defects in the former law, and the alterations made by the Act in question. They deal very fully with the important section which confers the powers, namely, section 6, which they divide into three heads; what streets an authority may deal with; what work an authority may do; how expenses are to be defrayed and apportioned. Procedure is very fully and carefully dealt with, and difficulties and doubtful questions pointed out. The next chapter is on the recovery of the expenses, followed by one on the charge when it is imposed on the premises—and it is particularly pointed out how this charge differs from the charge imposed by section 257 of the Public Health Act 1875. The last chapter, on Adoption of Private Streets, should be read by all owners of the soil of streets, whose rights are seriously affected by section 19. The Appendices contain the Act, sections of the Public Health Act 1875, and forms and precedents.

Bankers' Advances on Mercantile Securities. By ARTHUR BUTTERWORTH. London: Sweet & Maxwell. 1902.

We do not think that lectures make an ideal form of law book, but we think Mr. Butterworth has been well advised in publishing his lectures to the Institute of Bankers. It is not correct to say these lectures were all delivered to the Institute; the course consisted of four lectures; but, owing to a number of questions being asked and answered, the lecturer was unable to deliver himself in his prescribed number of lectures, and has added two more which are now published. We certainly recommend the reading of this book, not only to lawyers, but to business men. Lawyers will probably learn something more of business, and business men of law. We do not know whether Mr. Butterworth need have explained so carefully to such an audience the meaning of the commercial terms, but we have no doubt there are many lawyers, who are not often seen in the Commercial Court, to whom such information will be useful. Mr. Butterworth has a wide knowledge both of law and business, and we should particularly recommend the reading of the first two lectures, and then consideration of the questions put by shrewd business men as arising therefrom,

and the answers. We fear Mr. Butterworth has no good opinion of the decision in Lord Sheffield's Case, and thinks the House of Lords barely saved their credit by the explanation they gave of the former case in *Simmons* v. *London Joint Stock Bank;* but worse than this, he actually dares to differ with Judge Willis on the question of what constitutes a negotiable instrument.

Ruling Cases. By ROBERT CAMPBELL, M.A. London: Stevens & Sons. 1902.

We must congratulate most sincerely Mr. Campbell and the learned gentlemen who have assisted him, on the successful completion of their great work. They have produced the collection of Leading Cases, well selected, well arranged, with most valuable notes, illustrative of both English and American law. The Index and Table of Cases have been prepared by Mr. Edward Manson and are both thoroughly well done. Mr. Manson has also contributed a most readable preface in which he eulogizes Leading Cases as the best way of teaching law, and quotes from Professor Brown: "The study of case law is the one way to know the law." He also points out some interesting differences between the American and English law. Mr. Gould, who has revised Mr. Manson's Index from the American standpoint, points out in a short preface his reasons for thinking that the "English Leading Cases will have peculiar value for the Bench and Bar of the United States," and explains that the main object of the American Notes has been "to cite decisions following the lines of the main cases, from a wide range of our different State and National jurisdictions, thus facilitating further investigations." We notice one little misprint which creates the curious looking word "sacarment."

The Modern Lawyers' Office. London: Stevens & Sons. 1902.

This little book, written by "a Solicitor of the Supreme Court," is full of suggestions for improvements in the organisation of law offices and the appliances and methods therein. It will not diminish the attention which is likely to be paid to these suggestions, that they are largely taken from observations recently made by the writer in America. They are, to use a word we do not like, but cannot do without, thoroughly *up-to-date.* We recommend the book to the perusal of all solicitors who, whether they adopt the *Business Register* and Card System described or not, will, we are sure, find many things worth consideration and trial.

Registration of Title to Land. By W. G. NOTTAGE. London: Sweet & Maxwell. 1902. A good many opinions have been expressed about the Land Transfer Acts, and not all favourable, but Mr. Nottage in this useful little guide is entirely in its favour. He speaks as one who knows, for he is "Examiner, Survey and Map Department, Land Registry." His book is very practical, and will be found of special use in the branch of the subject with which his duties are connected.

The Statutes of the Commonwealth of Australia. Vol. I. 1901. Compiled by H. M. COCKSHOTT and S. ERNEST LAMB. Sydney: The Law Book Company of Australasia. 1902.

This volume possesses the interest of containing the first essays in legislation of the great Commonwealth so newly formed. It begins with the Commonwealth Constitution Act, and then follow seventeen Acts of the Commonwealth properly so called. The first is only Supply, but the second has the laudable object of the "Interpretation of Acts of Parliament and for Shortening their language." We at once notice the difference in the enacting clause from that in our own Acts, as it purports to be "by the King's Most Excellent Majesty the Senate and the House of Representatives," &c. The Acts relate mostly to the necessary steps to be taken to run the Commonwealth, such as Audit, Customs, Excise, Distillation, and Posts and Telegraphs. In the last we notice the significant clause, that every contract for carriage of mails must contain a condition "that only white labour shall be employed." There is an important Act for the Acquisition of Property for Public Purposes, where the principle of betterment is to be found, and an Act to place restrictions on Immigrations, &c., which has already given rise to litigation in the Privy Council.

A History of English Legal Institutions. By A. T. CARTER, D.C.L. London: Butterworth & Co. 1902.

This is an expansion of *Outlines of English Legal History*, published in 1899. Dr. Carter's researches have led him to consult fresh authorities, and so to modify some of the conclusions of the earlier volume. At the same time he has not named, and possibly not consulted, certain other authorities which might have been useful, *e.g.*, Professor Thayer's work on Evidence, and Messrs. Rhys and Brynmôr Jones' chapter on Welsh law in their well-known

treatise. Dr. Carter does not even mention the Court of Great Sessions of Wales. Certain interesting analogies might also have been adduced from the Icelandic *sjalfdomr*, *eptirmálr* and other terms. Among smaller omissions is that of Fleta's notice of the *secta* in appeals of felony, and of *covert* in forest offences, as well as of *vert* and *venison*. As to canonical purgation, is Dr. Carter quite right in saying that it was *duodecim manu*, as in Common law compurgation? According to some authorities the number seems to have been at the discretion of the ecclesiastical judge. It will be new to most readers to find that compurgation existed in the Tolzey Court of Bristol at least as lately as 1789. The book, as a whole, is most interesting reading. Its value is increased by an appendix containing an abstract of the "Little Red Book of Bristol," from a MS. of the fourteenth century in the British Museum, with its provisions for what Bracton calls *justitia pepoudrous* between traders in accordance with early *lex mercatoria*. As to other matters, Dr. Carter makes clear the extreme importance of the reeve and his four men as the basis of so many modern institutions. He is also quite sound on the object of early evidence, the object being to satisfy the Court that certain formalities had been observed, not to arrive at the truth of the case. (See Salmond's *Jurisprudence*, p. 588.) Some of the cases cited are not without humour, even to the lay reader. Examples are *Hodges* v. *Harry* (p. 153), *Aitken* v. *L. and N. W. R. Co.* (p. 188), the judgment of Cavendish, C.J., in Y. B. 50 Edw. III, 6, 12 (p. 216). The book is indispensable to the student, and is capable of teaching even the academic lawyer—not to speak of the practitioner—a good deal. It is almost the only work of the kind in the English language, and is a good specimen of what Oxford is doing on the historical side of law.

Second Edition. *The Stamp Laws.* By NATHANIEL E. HIGHMORE. London: Stevens & Sons. 1902.

A practice book of this nature is one that peculiarly requires to be kept up to date, as every year some Act is passed which extends or alters the Stamp Duties. For instance, although the last edition of this work came out in the early part of 1900, yet there have been three Finance Acts passed since, each of which in some point deals with Stamps. There have also been passed miscellaneous Acts of various kinds imposing duties. The result of the passing of these

Acts, and of the new decisions, has been that Mr. Highmore has had to increase the size of his work by fifty pages. The main part of the work is, of course, composed of the Stamp Act 1891, which is very fully and carefully annotated. A special feature, and one the value of which cannot easily be over-estimated, is the large amount of practical information as to the practice at Somerset House which Mr. Highmore is able to furnish, and which his official position as assistant-solicitor of Inland Revenue has given him exceptional opportunities of acquiring. After the Stamp Act 1891 come amendments and extensions of the Stamp Acts, consisting mostly of the various Finance Acts which since 1894 have been passed every year. Then comes a large variety of provisions imposing or relating to Stamp Duties on instruments not contained in Revenue Acts, and ranging in subject-matter from the Stamp Duty necessary on the appointment of a water bailiff, under the Irish Fisheries Act 1845, to the registers under the Cremation Act 1892. Then comes a most valuable collection of general exemptions, contained in Acts not otherwise relating to Stamp Duties. The only deficiency we notice in this very valuable work is, that the Index might with advantage be fuller, as there are several headings we miss.

Second Edition. *The Judicial Practice of South Africa.* By C. H. VAN ZYL. London: Wm. Clowes & Sons. 1902.

The title of this book is rather a peculiar one. It is not what we would call simply a book of practice, but it also contains a great deal of law, and it is really a treatise on the laws of Cape Colony and South Africa generally, with particular attention to questions of practice and forms. It was originally written for "the Articled Clerks, the busy Practitioner, and the Students who are working for their Practical Examinations for admissions of Attorneys." We are glad to notice from the preface to the second edition that the learned Author's anticipations have been realised, and that it has also been of use to the Legal branch of the Civil Service and candidates for University law examinations. The book bears the signs of learning and experience, and should be of considerable use to anyone in this country who has to ascertain the law and practice of South Africa. Many of the points of difference between our own and the Roman Dutch law are worth observation, for instance, some remarkable differences in the law of Seduction and Affiliation.

Second Edition. *The Law relating to Cheques.* By ERIC R. WATSON. London: Sweet & Maxwell. 1902. We are glad to see that this little book, which was reviewed as lately as in our May 1902 number, has been so successful as to justify another edition, and note that Mr. Watson has considered and profited by the suggestions made by ourselves and others.

Third Edition. *The Law of Evidence.* By SIDNEY L. PHIPSON, M.A. London: Stevens & Haynes. 1902.

Considerable alterations have been made in this edition. One of the most important of these is the inclusion of the Criminal Evidence Act 1898, and the decisions thereon. The opportunity of bringing out this edition has also been utilized to expand and re-write other chapters, notably those on Extrinsic Evidence to affect Documents, and Evidence in aid of Interpretation. When it is mentioned that in addition more than 700 new cases have been referred to, it will be seen that this work has been substantially altered. Although a small work compared to Taylor, the text of this edition contains more than 600 pages, and the statements never err in diffuseness. The result is, that there are few points which are not fully treated, though the conciseness of some of the treatment necessitates very careful reading. The tables of illustrative cases arranged in parallel columns, and contrasting evidence which was and was not admissible, form an important feature of the work; but the statement of the case does not always bring out the point sufficiently. For instance, in the citation of *R.* v. *Kay*, p. 68, it is not quite correct to say, that neither the signing of the register by B., nor the statement she made to her mother, were *admissible* to prove knowledge that she had been falsely described in the banns. The second fact was held inadmissible, but the former was held not to prove such knowledge. Another among the very few passages we have noticed that we do not agree with, is that in perjury cases *material* facts "mean all such as are provable at the trial." This seems to us too wide. It is not correct to state that it is not the practice for counsel for the prosecution to open the case when the prisoner is undefended. It is common to hear counsel, when they have no other argument to urge in support of the admission of a piece of evidence, to contend that it is part of the "*res gesta.*" We recommend all who are in the habit of adopting this course to clear their minds by carefully perusing Chapter VI, in

which the subject is treated in a masterly manner. Another important point well brought out is the modification of the old rule that "the best evidence must be given of which the nature of the case permits," and which now seems to be confined to documents. Mr. Phipson uses the terms *circumstantial* and *presumptive* evidence as synonymous, the accuracy of which use is disputed in *Wills on Circumstantial Evidence*, noticed elsewhere, where it is stated that "circumstantial and presumptive evidence differ therefore as genus and species."

. **Third Edition.** *Law of Burials.* By J. BROOKE LITTLE. London: Shaw & Sons. 1902.

Since the last edition in 1894 a very important Act has been passed relating to the Law of Burial. This is the Burial Act 1900, the objects of which are, as stated by Mr. Brooke Little, "to equalise as nearly as possible the position of members of the Church of England and Nonconformists with regard to interments in public burial grounds, and to assimilate the regulation of cemeteries established under the Public Health (Interments) Act 1879 to that of burial grounds provided under the Burial Acts." To carry out these objects has been no easy task, and it has been rendered more difficult by the necessity of making provision for existing vested interests. The difficulties that may arise will be seen by anyone who turns to the learned and elaborate notes appended to each section of that Act, in which both the former law and the alteration effected by the Act are given. It is curious, for instance, to notice the difference in the positions of burial boards, and local authorities, in case the bishop should refuse to consecrate the burial ground. Another question which is not clear is "whether a chapel may be built upon the consecrated portion of the burial ground or cemetery at the request and cost of members of the Church of England." A way is pointed out how in all probability this question may be solved. There is a good deal of obscurity under the provisions safeguarding the interests of incumbents as regards fees, but the learned Editor has done his best to make it clear. The Cremation Act 1902 is an important new Act, which does not come into operation till this year. References to, or parts of, a very large number of Acts are given, and the effect of subsequent legislation on each explained. The introductory chapter contains the common and civil law of burial which, collected as it is from so many sources, is not

always quite settled. Some interesting points, about the powers of various authorities to order or permit the removal of bodies, seem doubtful, and the respective effects of a Coroner's order, a faculty, and a licence from a Secretary of State, have yet to be definitely decided. We notice, because it is so rare, one little misprint, on page 90,—Burial Act 1900 is given as Burial Act 1901.

Third Edition. *Wharton's Legal Maxims.* By the late GEORGE F. WHARTON. London: *Law Times* Office. 1903. We do not think collections of maxims with observations and cases make a useful form of law book, and the print of this one is so small that it is very trying to read.

Fourth Edition. *Leake on Contracts.* By A. E. RANDALL. London: Stevens & Sons. 1902.

We are glad to see a new edition of this excellent work. Years ago Sir William Anson said, "Mr. Leake treats the subject from every point of view in which it can interest a litigant." That is the sort of book a practitioner wants, and the present edition well maintains that reputation. We have tested it practically lately, and found in it information on a point for which we had searched many other books in vain. As it is ten years since the last edition came out, a large number of new cases have had to be included and the text reconsidered in the light given by them. The principal alteration in consequence seems to have been made in the part dealing with contracts in restraint of trade, which Mr. Randall states has been rewritten in consequence of the decision in *Nordenfeldt* v. *Maxim Nordenfeldt Gun and Ammunition Co.* Another branch of law which has been lately much discussed and explained, is wagering contracts, on which numerous decisions have been given in the last ten years, including *Strachan* v. *Universal Stock Exchange.* Some other important cases have arisen out of the recent war in South Africa, such as *Driefontein Gold Mines* v. *Janson*, and are considered, among other places, under the head of the "impossibility of performance." We are sorry that the question of the "Coronation Seats" could not be included, but of course it was impossible, as it is even now far from being settled. The only omission we have noticed is that there is no table of Statutes, which strikes us as a mistake, as such a table often supplies a very convenient means of reference.

Fourth Edition. *Redress by Arbitration.* By H. FOULKS LYNCH. Revised by G. D. F. de l'Hoste Ranking, M.A., LL.D. London: Effingham Wilson. 1902. This short digest of the law of Arbitration is well arranged and clear, and we are glad to see that the system of reference to the reports has been improved since the last edition.

Fifth Edition. *Wills on Circumstantial Evidence.* Edited by SIR ALFRED WILLS, Knt. London: Butterworth & Co. 1902.

This well-known treatise on Circumstantial Evidence, published so long ago as 1838, has not had a new edition for forty years. It has now been carefully revised by the learned Judge who edited the last edition, and has been enriched by numerous illustrations from cases which have since been tried. In two of the new cases introduced—cases of the highest interest and importance—the learned Editor was himself engaged; in the Matlock Will case as counsel; and in *Howe* v. *Burchardt and Another* as Judge. By these additions the value and interest of the work have been increased. A marked feature is the full account which is given of many important trials, in which both the value and the dangers of circumstantial evidence clearly appear. Perhaps the most remarkable of these is the trial of Abraham Thornton, as there can be no doubt that the evidence would have convicted the prisoner if it had not been for the unusually complete *alibi* he was so fortunate as to be able to set up. The cases also of *R.* v. *Pook* and *R.* v. *Franz* are very instructive. On the other hand, the force of circumstantial evidence appears in the cases given in sect. 3 of Chapter VIII. There is an interesting note by Dr. Wills on blood-stains and their identification. In conclusion, we would refer all our readers who take an interest in Copyright to the preface, where Mr. Justice Wills sets out with delicate sarcasm the treatment of the last edition of this treatise in America.

Fifth Edition. *Law of Torts.* By H. FRASER, M.A., LL.D. London: Sweet & Maxwell. 1902.

This new edition of Mr. Fraser's Compendium of the Law of Torts has no marked alterations or additions beyond the references to new cases of importance such as *Allen* v. *Flood.* We have before stated our disagreement with the doctrine maintained by Mr. Fraser in his book on Libel, that reports which fall within the protection of

sect. 3 of the Law of Libel Amendment Act 1888 are absolutely privileged. We notice a slight correction in treating on the disqualifications to sue of convicted persons. We know of no better book than this for students.

Sixth Edition. *A Guide to Criminal Law.* By CHARLES THWAITES. London: Furnival Press. 1902.

This book is intended for the assistance of students in passing examinations, and is very well adapted for that purpose. The information is very clearly and accurately put, and the arrangement is good. There is a number of questions at the end of the book to enable the student to test his knowledge, with references to the pages where the answer can be found, or in some cases the answer is given following the question. We have been struck by the accuracy of the work. We think, perhaps, the reference to *R.* v. *Fisher*, on the question of what provocation is sufficient to reduce homicide to manslaughter, might mislead a student. The statement in the text is a perfectly accurate deduction from the judgments of the learned Judges who decided the case; but as a matter of practice the whole question is left to the jury, and they are not, as the passage referred to would appear to indicate, merely asked to find how long an interval elapsed between the provocation and the killing.

Sixth Edition. *Saunders's Practice of Magistrates' Courts.* By R. M. STEPHENSON, LL.B., and J. HOWARD LINDSAY, M.A., LL.B. London: Horace Cox. 1902.

Not only are the Summary Jurisdiction Acts and many other Acts under which proceedings are taken before magistrates, fully annotated, contained in this book, but what is equally useful, and often much more difficult to find, there is sound practical advice on the conduct of proceedings. For instance, excellent advice will be found under the head of "hearing" at petty sessions, as to the advisability of the prisoner making a statement, an address to the Bench, and calling witnesses. There is full information also given as to the proceedings at Quarter Sessions, though we notice it is not made clear that the right to challenge, and the calling upon the prisoner after conviction, only apply to cases of felony. This, however, concerns the duties of the officer of the Court, not those of the representatives of either the prosecution or the prisoner.

Eighth Edition. *Principles of Bankruptcy.* By RICHARD RINGWOOD, M.A. London: Stevens & Haynes. 1902.

Mr. Ringwood sets forth very clearly the main principles of Bankruptcy, and the present edition contains a number of new cases of importance decided since the date of the last one. Bankruptcy is a very wide and difficult subject, and both students and practitioners should be grateful for a careful and accurate *résumé* of principles. The chapter on Bills of Sale gives a very good idea of the practical and lucid manner in which the various heads of the subject are treated. We notice that all the misdemeanours under the Debtors Act 1869, and the Bankruptcy Act 1883, are given.

Fourteenth Edition. *Paterson's Licensing Acts.* By W. W. MACKENZIE, M.A. London: Butterworth & Co. 1902.

Second Edition. *The Law of Licensing, Intoxicating Liquors, Theatres, Music Halls, and Clubs.* By J. BRUCE WILLIAMSON. London: William Clowes & Sons. 1902.

The Licensing Act 1902. By JOSHUA SCHOLEFIELD and GERARD HILL, M.A. London: Butterworth & Co. 1902.

Supplement to Montgomery's Licensing Laws. By R. M. MONTGOMERY. London: Sweet & Maxwell. 1902.

A Practical Guide to the Licensing Act 1902. By CHARLES L. ROTHERA. London: Jordan & Sons. 1903.

The Licensing Act 1902: A Practical Guide. By H. LINDON RILEY. Liverpool: James Cornish & Sons. 1902.

The natural and inevitable result of the Licensing Act 1902 has been the issue of a large number of books. These may be divided into two classes. The first consists of new editions of treatises on the Licensing Laws, revised, and amended so as to contain the cases decided since their last issue, and the Act of 1902. The second and the most numerous class consists of annotated editions of the Act, with, of course, such statements of and references to the previous Acts as are necessary to explain its provisions. The arrangements adopted in the two well-known treatises which head our list are somewhat different. In *Paterson's Licensing Acts*, after the introduction, the three leading Statutes, namely, the Acts of 1872, 1874, and 1902, are given one after the other, and explained and commented on in copious notes and cross references. Then, in the

Appendix, all the other Licensing, Alehouse, Beerhouse, Refreshment-house, Wine and Beerhouse Acts and many Excise Acts, are given in chronological order, commencing with the Alehouse Act 1828. These are similarly supplied with full notes and cross references. Some forms, reports of the leading cases of *Sharp* v. *Wakefield; Boulter* v. *Kent JJ.;* and *R.* v. *Farnham JJ.*, and a full Index, complete the work. The value of this book is so well established that it is hardly necessary to say more than that the new matter has been as carefully considered as the old, and to call attention to the very complete and exhaustive character of the notes. The reports of the judgments in the three great cases add an element of considerable value.

Mr. Williamson, on the other hand, goes through the whole subject carefully from the beginning, commencing with the scope of justices' jurisdiction. The Acts are referred to and cited from, at each stage. The main parts into which the subject is divided, are:—I. Jurisdiction of the Justices of the Peace: II. Provisions as to the closing of Licensed Houses: III. Offences arising out of the sale of Intoxicating Liquors: IV. Prosecution of Offenders: V. Registration of Clubs: VI. Licensing of Theatres, Music Halls, &c. There are two more parts containing Appendices of Statutes and Forms. In both these works the Act of 1902 is carefully gone through, commented on, and references made to any Statutes incorporated in it or referred to expressly or by implication. It is interesting sometimes to compare the opinions of the learned authors on particular decisions, and we notice that Mr. Williamson is rather the more critical of the two, as he casts doubts on the cases of *R.* v. *Market Bosworth JJ.; Carman* v. *St. Margaret's JJ.;* and *Davies* v. *Evans*, to all of which Mr. Mackenzie refers without disapproval. Mr. Williamson, also, is not quite satisfied with the decision in *R.* v. *Staffordshire JJ.*, that Quarter Sessions on licensing appeals have no power to order the respondent justices to pay the costs of a successful appellant. Attention should also be given to Mr. Williamson's treatment of what he considers the doubtful and unsatisfactory state of the authorities, with regard to the issuing of writs of *certiorari* and *mandamus* to licensing justices, and his doubts as to the correctness of the decision in *R.* v. *Sharman.*

Mr. Montgomery has brought out a supplement to his work on the Licensing Laws, which contains the Intoxicating Liquors (Sale

to Children) Act 1901 and the Licensing Act 1902 and the recent decisions on the subject. Mr. Montgomery considers that the one change of great importance made by the recent Act "is the requirement that Clubs should be registered." He therefore begins with this part of his subject and treats it fully. There are a good many difficult points to consider, and it may be noticed that Mr. Mackenzie and Mr. Montgomery do not hold quite the same opinion as to what would be occupation or habitual user of premises by a Club; in fact, it is clear, from the opinions expressed by these learned authors, that many points will arise for judicial decision. Mr. Montgomery points out some apparent oversights in the Act in regard to billiard licences, and spirit dealers' additional licences, and considers that sect. 4, as to permitting drunkenness, is very obscure.

Messrs. Scholefield and Hill's little book is in a very handy form and gives a short but clear introduction and summary of the Act, and the Act itself annotated with short but useful notes contrasting the old and the new law. The note on the position of proprietary clubs is interesting and suggestive.

Mr. Rothera has had from his position, as Solicitor and Secretary to the Licensing Laws Information Bureau, great experience in licensing matters. He deals to a considerable extent with general principles, which rather concern the spirit in which he considers the justices should approach and carry out their duties, than the actual law, but at the same time he discusses the Act very fully, with a thorough knowledge of the law, and a keen regard to what its practical results are likely to be. This very practical view gives a special value to his work, and though all his readers may not agree with the way he regards the licensing question, they will all find much assistance in construing and dealing with the Act.

Mr. Riley's *Practical Guide* is prefaced by a humorous introductory letter, is published in an unusual shape for a small book, and is printed on only one side of the paper, thus leaving the other side available for notes. The notes, though printed in rather too small a type, are clear and practical, though sometimes too vivacious for our taste. There are abundant references to and quotations from the Statutes necessary to be referred to, and some useful little summaries, such as that in note 1 to sect. 16, and the time table for appeals given in note to sect. 11. We hardly agree with Mr. Riley, however, that a man's "office" is yet included in the "public places" where he may not get drunk. We have received the advance sheets of a new edition of this book.

Seventeenth Edition. *Woodfall's Law of Landlord and Tenant.* By J. M. LELY. London: Sweet & Maxwell. 1902.

This well-known work last year celebrated its centenary and the present is the seventeenth edition. There can be very few, if any, standard text books which have such a long successful career to show. The difficulty to include all the information on its subject, and at the same time keep its size within reasonable bounds, must be very great. To make room for new statutes and new cases something must every now and then be omitted; and this year we find it has been the lot of "Commons" and "Watercourses" to go under. To deal with such a work in detail is impossible, and we can only call attention to a few new features. Since 1898, when the last edition was published, there has not been much new legislation, and the only new Acts we notice referred to, are the Agricultural Holdings Act 1900 and the Licensing Act 1902. The most important new cases are two as to quiet enjoyment, *Budd-Scott* v. *Daniel* and *Davis* v. *Town Properties Investment Corporation.* Mr. Lely compares *Budd-Scott* v. *Daniel* with *Baynes* v. *Lloyd* with great care, and comes to the conclusion that the decision of the High Court in the former case is to be preferred to that of the Court of Appeal in the latter, although he thinks that on one point—namely, as to whether acts constitute a legal breach being a question of law—the decision in *Budd-Scott* v. *Daniel* was wrong. An interesting addition in this volume is headed "*Defects in the Law,*" giving a list of thirteen points on which the learned Editor thinks legislation necessary, either to alter or make certain the present law. Although Mr. Lely contends, and he is no doubt technically right, that no Act becomes obsolete by mere non user, yet it is not always worth while to pass an Act to repeal it, and this rather seems the case with his thirteenth point. We quite agree with him in his remarks on the statutes of forcible entry and the law of distress; and the other points are worth considering. We notice some misprints. In sect. 128 of the Public Health Act 1875, the words "such person" have been introduced wrongfully, making sad confusion of the grammar; and on page lxxvi the references to both *Tremure* v. *Morison* and *Titterton* v. *Cooper* give the wrong pages. The note in Appendix G, on what may be called Coronation seat law, has been rendered of little use by the number of cases on the subject recently decided.

CONTEMPORARY FOREIGN LITERATURE.

Droit et Aerostats. By ERNEST NYS, Professor at the University of Brussels. Brussels: 1902.

This is a reprint of an article in the *Revue de Droit International*, and gives in a convenient form all the law, international and otherwise, arising from the development, partly actual, but mostly hypothetical, of aerial navigation.

Rassegna di Giurisprudenza Inglese in Materia di Obbligazioni. By MARIO SARFATTI. Milan: 1902.

This brochure of nineteen pages has a somewhat extensive title, making one wonder how so small a book can contain a review of the whole English law on the subject. It appears however, on examination, that there are only eight somewhat thin essays dealing with particular points, such as *vis major*, wagering contracts, and married women's property. The learned author, like most foreigners, finds some difficulty in quoting the English authorities. *Il giudice C. Hardy* needs a little thinking out, and so does *Taylor* v. *G. Ry.*

PERIODICALS.

Deutsche Juristen-Zeitung. 1 October—1 December, 1902. Berlin.

At page 525 is an article by Dr. Manes, of London on the litigation which has arisen in England with regard to seats for the Coronation procession. He tests the matter by the provisions of the Civil Code, by which apparently some of the decisions would be good and others not. In other parts of this valuable periodical points which could not arise in England are discussed. For instance, who bears the costs of proceedings for divorce on the ground of lunacy? Can the decisory oath be administered to a party who has deposited security?

Rivista di Diritto Internazionale e di Legislazione Comparata. July—September, 1902. Naples.

Two articles will interest English jurists, one by Professor Enrico Catellani on consular courts in the East, the other by Professor Gennaro Mondaini on spheres of influence. Both have the advantage of being fully illustrated by original documents.

La Giustizia Penale. 29 September—1 December, 1902. Rome.

This contains a complete digest of the more important Italian

decisions for over two months, and is edited with the skill and completeness which is expected in a periodical of such high standing. One or two decisions of interest may be noted. A witness supposed to be under fourteen gives evidence not on oath. It afterwards appears that he was over fourteen at the time. The evidence need not be rejected on appeal. It is apparently a matter for the discretion of the Court of Appeal whether or not it is to be taken into account (p. 1229). A soldier on active service is a person *d'ignota dimora* within Art. 311 of the Code of Penal Procedure (p. 1230). The cycle tax does not extend to automobiles (p. 1366).

JAMES WILLIAMS.

WORKS OF REFERENCE.

The Lawyer's Companion and Diary, 1903. Edited by E. LAYMAN, B.A. London: Stevens & Sons.

The Legal Diary and Almanack, 1903. London: Waterlow Bros. & Layton.—These two well-known publications contain, in addition to a diary for every day in the year, much information both of a legal and general character, including a list of Stamp Duties, Tables of Costs, an Index to Practical Statutes, &c. The contents of both Diaries appear to have been carefully revised to date, and the various lists, so far as we have been able to test them, are free from inaccuracies.

The Lawyer's Remembrancer, 1903. Compiled by ARTHUR POWELL, K.C., London: Butterworth & Co.—A very useful little work. Special articles on the new Rules, and on the Conduct of a Trial are included in the present edition, and the whole of the contents has received a thorough revision. The handy size of the book allows of its being easily carried in the pocket.

Fry's Royal Guide to the London Charities. Edited by JOHN LANE. London: Chatto & Windus. 1903.—This guide, giving as it does a full list of the various London Charities, together with their incomes and needs, will be found extremely useful by solicitors when settling testamentary dispositions, and by others who may have money for distribution. The information given is clear and concise, and is just what is wanted in these days when busy men have not the time to turn over thick volumes or read long statements.

Who's Who, 1903. London: A. & C. Black.—This well-known work of reference, which now reaches its fifty-fifth year of issue, is perhaps the best Annual of its class. Many of the tables that found a place in the previous issues of this book have had to be removed in order to allow more space for the biographical section, which has grown considerably during recent years. The publishers will, we understand, re-issue these tables separately in the near future, and we think this course far preferable to increasing the bulk of what is now a most handy biographical dictionary. The contents of the present issue have been revised to the end of September last, and are remarkably complete and accurate.

Whitaker's Almanack, 1903. London: Whitaker & Sons.—This Annual is so well-known and deservedly popular that any praise from us would appear somewhat superfluous. Some idea of the manner in which the Almanack has expanded may be gathered from the fact that since its foundation the size of the work has more than doubled, the present volume containing 792 pages as against 367 in the first number. Many new articles have been added, and the permanent features have all been thoroughly revised up to the time of going to press. Amongst the new articles are those on the Education Bill, An Aspect of the Temperance Question, Copyright, &c. The book treats of almost every subject, and is well-nigh indispensable as a work of reference.

Other books and publications received:—Addison's *Law of Contracts*; Carson's *Real Property Statutes*; Ashburner's *Principles of Equity*; Smith's *Principles of Equity*; Beven's *Employers' Liability and Workmen's Compensation*; *The Yearly County Court Practice, 1903*; Dicey's *Law of the Constitution*; Williams and Macklin's *Evidence on Commission*; Ellis's *Trustee Acts*; *A. B. C. Guide to Practice, 1903*; Indermaur and Thwaites' *Guide to Procedure*; *Every Man's Own Lawyer*; Tomlinson and Wright's *Statutory Prayer Book*; *Are Prayers for the Dead Superstitious?* (Elliot Stock); *The Annals of the American Academy of Political and Social Science*; *Bulletin 76, New York State Library*; *The Alaska—Canada Boundary Dispute* (T. Hodgins, M.A.).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*, *Columbia Law Review*, *Japan Register*.

THE

LAW MAGAZINE AND REVIEW.

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I.—LEGAL ETYMOLOGY.

THE etymology of legal terms has exercised the ingenuity of writers from Plato down to modern times. The combined fascination and utility (at any rate apparent) of the pursuit has led some writers to use quite enthusiastic terms about it. Thus Plato says, ὃς ἂγ τὰ ὀνόματα ἐπίστηται ἐπίστασθαι καὶ τὰ πράγματα (*Cratylus*, 435). This is quite in accordance with a philosophy which taught that the knowledge of words was *ipso facto* a knowledge of things. Coke, though no Platonist, approaches very near Plato where he says, "The names of things are for avoiding of confusion diligently to be observed,"[1] a rule which he violates as often as he keeps. In another place he says, "Here (as in many other places) it appeareth how necessary it is to know the signification of words."[2]

In the Semitic languages the Talmud, the Zohar, and other works, are a mine of strange etymologies of legal terms, mostly depending on what is to the Western mind the wildest juggling with letters and numbers. Among non-Semitic peoples the Greeks and Latins early occupied themselves in the matter, partly in lexicographical works, such as those of Harpocration and Mœris, and, in the Lower Empire, Suidas and the *Etymologicon Magnum*, partly in

[1] *Co. Litt.*, 86b. [2] *Ib.*, 325a.

distinct treatises, such as the *Cratylus* of Plato. The etymologies of the *Cratylus* are so amazing that Jowett suggests that the writer was partly in jest and partly in earnest, an explanation offered at a later date, as will be seen, in favour of some of the Latin ones. The only legal ones seem to be δίκαιον from διαϊόν, because justice runs through all things, and δέον, obligation, suggested to be of foreign origin. Among the more specialised writers of a later date may be named Isidorus, Spelman, and last of all Ceci.[1] The ordinary legal works, especially the *Corpus Juris* and Lord Coke *passim*, offer a rich field of research, and so do some of the works of non-legal writers, such as Aulus Gellius, Solinus, Dante, Stephanus (*Thesaurus*), and others, until we finally arrive at the last word—for the present at least—in Drs. Skeat and Murray.

The Romans seem to have attributed an undue value to etymology in law, if one may judge by what Gellius says of Antistius Labeo, *Latinarum vocum origines rationesque percalluerat, eaque præcipue scientia ad enodandos plerosque juris laqueos utebatur*.[2] On this point the words of Dr. H. J. Roby may also be cited: "The practice of drawing inferences of law from etymology is not confined to the old Roman lawyers, and is not purged of its mischief by the etymology's being, as it sometimes is, probably right. The actual meaning of a word is determined by its use, not by its origin."[3]

The earliest Roman writer of importance for this subject

[1] The most modern authority seems to be Luigi Ceci, *Le Etimologie dei Giurisconsulti Romani* (Turin, 1892). By this learned writer the present writer has continually been guided in much of what follows.

[2] xiii, 10. His derivations of *frater* and *soror* (see below) do not seem very happy results.

[3] *Roman Private Law*, vol. i, p. xvi (1902). An example of an inference of law from etymology may perhaps be seen in *testamentum*, the accepted derivation of which no doubt led to a disproportionate discussion of the mental element in a Roman will. Another instance would be the Spanish etymology of Saracen (see below), which would tend to make the Spanish Christian regard the Mahommedan as subject to the legal disabilities attaching to the Jew.

was Varro, a contemporary of Cicero. In the remains of his works are to be found such derivations as the following,—*ager* from *agere, anfractum ab ambitu et frangendo, jugerum* from *jungo, jurgare* from *jus, pecus* from *pes, prædia* from *præstare, spondere* from *sponte. Nexum* is *neque suum*, and *Romulus* produces *Ramnenses.*[1] Festus is more prolific and perhaps more reasonable than Varro, but he has his curiosities, sometimes even more striking than Varro's. *Bustum* is *quasi bene ustum*, *curia* is the place *ubi publicas curas gerebant, fenus* is from *fetus*, because money makes money, *fasti dies* are from *fari, locupletes* are *locorum multorum domini. Multa* (fine) is a Sabine word, meaning "one;" and because a fine was originally one sheep, the word came to mean a fine. Festus' most famous derivation is that of *provinciæ*, so called *quod populus Romanus eas provicit, id est, antea vicit.*

Gellius sometimes frames his own etymologies, sometimes objects—and generally with good reason—to those framed by others. Examples of the former are *succedaneus* (a word used by Ulpian), from *succidere, religio* from *relinquere*, because we leave religious places alone,[2] *persona a personando, putum* (in the legal phrase *purum putum*) from *putare*, because it is what we think pure. He is more correct than the jurists in deriving *testamentum* directly from *testis*, and not regarding it as a compound of *testatio mentis*. He objects to Antistius Labeo's derivation of *frater*, which is *quasi alter*, and of *soror* from *seorsum*, because she is separated from her old family. He will not have *bidentes* as being *biennes* or *fenerator* as φαινεράτωρ, because a usurer makes a

[1] St. Augustin, following Varro, has few etymologies of legal interest. The names of the Nature-Gods in *De Civ.*, iv, 8, 11, &c., are scarcely of this character, nor are those of *consul* and *rex*, v, 12. ἄγγαρος and *prodigium* are perhaps legal, but one cannot accept the identity of the former with *angelus* (xv, 23), or the derivation of the latter from *porro dicere* (xxi, 9). It is in proper names that he goes farthest astray. *Mercurius* is *medius currens* (vii, 14), *Proserpina* is from *proserpere*, because fruits creep out of her (vii, 24), and *Serapis* is a contraction of *Sorosapis*, the coffin of *Apis* (xviii, 5).

[2] For this he cites Sabinus, *De Indigenis*, a work now lost.

show of honesty. Solinus, though he has no etymologies of law words, is interesting, because he derives *Roma* from *Rome*, a noble captive lady.[1] This is at least possible, but his more famous attempt at the origin of the name *Tanatus* (Thanet)[2] is surely absurd, though no worse than Donatus' *sepulcrum*.[3] The connection of Ulysses with Lisbon, both historically and etymologically, seems to depend on Solinus.

The main coiner of etymologies in later Latin was Isidorus Hispalensis (d. 636), and he is the earliest Latin writer who has left an extant work directly on the subject, under the name of *Originum seu Etymologiarum Libri* xx.[4] Although he was later in date than the jurists of the *Digest*, he seems to have owed them nothing in respect of etymology. *Avarus* is *avidus auri*, *mandatum* is from *manus*, *depositum* is *diu positum*, *interdictum* is *interim dictum*, *sequester* (following Servius)[5] is from *sequi*, *tribuni* from *tribuere*. But his most famous attempt is *codicillum*, which is *sine dubio ab auctore dictum qui hoc scripturæ genus instituit*. Britton, as we shall find, erred in the same direction.

Coming to the professed jurists, Gaius affords a considerable number of more or less successful attempts, some in the *Institutes*, some in his works cited in the *Digest*. Among those of the *Institutes* the following are the most interesting: *Spurii* are so called because they are σποράδην *concepti* or *sine patre* (i, 64),[6] *mancipatio* is so called *quia manu res capitur* (i, 121), *usureceptio* because *recipimus per*

[1] *Polyhistor*, i, 2.

[2] So called because *cum ipsa nullo serpatur angue, asportata inde terra quoquo gentium invecta sit angues necat*, xxii, 8, *i.e.*, Tanatus is θάνατος.

[3] *Sine re pulcra.*

[4] The *Libri de Origine Vocabulorum* of Gabius Bassus (cited by Gellius, ii, 4; v, 7), must of course have been earlier, but it has not come down to us.

[5] The scholiasts and commentators like Servius, both Greek and Latin, often try their hands at etymology. The scholia on Theocritus are full of them. Few are of legal interest. Servius' *clientes* from *colentes* is one of the worst.

[6] In *Dig.* i, 5, 23, Modestinus puts it παρὰ τὴν σποράν.

usucapionem (ii, 59), *mutuum* because *ita tibi a me datum est ex meo tuum fit,* (iii, 90),[1] *præscriptiones quod ante formulas præscribuntur* (iv, 32). In the *Institutes* of Justinian the compilers generally borrowed etymologies from Gaius or the *Digest,* sometimes with slight alterations, as in *mutuum.* They are of course not as prolific in etymologies as the larger work. A selection is as follows: The Romans are called *Quirites* from *Quirinus* (i, 2, 2), *servi* are from *servare,*[2] and *mancipia* from *manu capere* (i, 3, 3), *testamentum* from *testatio mentis* (ii, 10, pr.), *stipulatio* from *stipulum,* and that from *stipes* (iii, 15, pr.). *Injuria* is *omne quod non jure fit, contumelia* is from *contemnere* (iv, 4, pr.),[3] *telum* is ἀπὸ τοῦ τηλοῦ (iv, 18, 5).[4]

As to the *Digest,* we may make two divisions, those which would be accepted to-day and those of more doubtful validity.[5] Among the former are the derivations—generally fairly obvious—of *consanguinei, decuriones, mobilia, sanctum,* and others. The derivations of *justum* from *justitia*[6] and of *urbs* from *urbum* might be good if put the other way about. Among the latter are several impossible Greek ones. In addition to *spurii* and *telum* above we have *rivus* from ῥεῖν, *turba* from θορυβεῖν, and *fures* from φῶρ or φέρειν, as well as the alternative derivations from *furvus, fraus,* or *ferre* (xlvii, 2, 1). Other doubtful or fanciful ones are *cognati quasi ex uno nati* (xxxviii, 8, 1, 1), *damnum ab ademptione et quasi deminutione patrimonii* (xxxix, 2, 3), *familia* from *fons memoriæ* (l, 16, 195, 4), *oppidum ab ope* (l, 16, 239, 7), *pignus a pugno* (l, 16, 238, 2),

[1] This is slightly altered by Justinian in *Inst.* iii, 14, pr.

[2] This derivation is of frequent occurrence all through legal history. Coke and others follow it.

[3] Following Ulpian in *Dig.* xlvii, 10, 1.

[4] Following Gaius in *Dig.* l, 16, 233, 2.

[5] As to these, a question has suggested itself to some writers whether their framers were quite serious. See, for instance, C. A. Duker, *Opuscula Varia de Latinitate Jurisconsultorum Veterum* (Leyden, 1741). His words are *luserunt scilicet in iis ἐτύμοις proponendis et ingenio suo indulserunt.*

[6] S. Thomas Aquinas on the same principle derives *jus* from *justum.*

pratum is *paratum* (l, 16, 31), *possessio* is *a sedibus quasi positio* (xli, 2, pr.), *specus* is *locus ex quo despicitur* (xliii, 21, 1, 3), *supellex* is from *sub pellibus* (xxxiii, 10, 7, pr.), *tignum* and *toga* are both from *tegere* (xlvii, 3, 1, 1; l, 16, 180), and last, but not least, *vidua* is *sine duitate* (l, 16, 242, 3).[1] Occasionally a derivation is named only to be rejected. Thus Ulpian disapproves of the derivation of *taberna* from *tabulæ* (l, 16, 183).

The commentators have very little in the way of attempts at derivation. That by Azo of *pactum*—*a percussione palmarum*—is one of them. Others are to be found in Scipio Gentilis.[2] But though the commentators were chary of their guesses, one at least of the early codes found compilers who were greatly daring. In the *Siete Partidas* of Castile (begun 1256) occur some very remarkable specimens. *Criado* is from *creare*, *fuero* from *forum*, *vozero*, an advocate, is so called because he exercises his voice. These may pass muster, but what is to be said of *ley* from *leyenda* (reading), *matrimonio* from *matris munium*, and *Saracen* from Sarah, the wife of Abraham?

Dante's etymologies are interesting, though some of them are not strictly legal. They are probably drawn to some extent from Uguccione, *De Derivationibus Verborum*, cited in *Convivio*, iv, 9. Among obvious ones are *certum facere* (*De Mon.*, ii, 8), and *filosofo* (*Conv.*, iii, 11). *Cortesia* is from *corte* (ii, 11). *Nobile* is not from *cognoscere* but from *non vile* (iv, 16). The strangest is *autore*. This is either from A E I O U or from a supposed Greek word *autentin*. Benvenuto da Imola carried his imagination further than his master, for with him *Averroes* is compounded of *a* and *veritas (quasi senza verità)*. Researches among the medieval jurists would probably discover others as curious. Du Cange supplies a good many, including the somewhat barbarous term *etymologicare*.

[1] Another etymology which the writer has seen suggested is *vis duarum*.

[2] They will be found in E. Otto, *Thesaurus Juris Romani* (Leyden, 1711), and in other compilations of a similar kind.

As to Canon law, the *Corpus Juris Canonici* has no room for etymology, but some of the commentators contain a little. Van Espen has a few obvious ones, such as *consistorium* from *consistere, simonia* from Simon Magus.

In later times Joannes Calvinus is one of the writers most prolific in etymologies. They occur in both his works.[1] Examples are *allod, als leud, universa plebs, armandiæ ab ariditate, baro* from Hebrew *bar*, a son, or from βαρύς, *pretium* from *peritium*, because it is fixed by the judgment of *periti* or experts, *uxor ab unguendo*, because a wife uses perfumes.

In England the earliest etymology in order of date appears to be the elegiac couplet composed by Fitzstephens in honour of Thomas Becket as Chancellor:

> "*Hic est qui regni leges cancellat iniquas,*
> *Et mandata pii principis æqua facit.*"[2]

Glanvill has few or none, but a few of some interest are to be found in the *Dialogus de Scaccario*. These are, in order of occurrence, *scaccarium*, the Court from the game (i, 1), *Tricolumnis* (a book), as being in three parts (i, 5), *Danegeldum* (i, 11), *foresta, quasi feresta, hoc est ferarum statio* (i, 12), *thesaurus, auri thesis* (i, 14). In Bracton there are not many of much interest. Among the more curious are *baro*, which is *robur belli* (5b), *communis* is *una cum, alio* being understood (222b), *jus* is from *justitia* (2b), *munus* from *manus* (106b), *possessio* is *pedis positio* (160a), *ringa* (an earl's belt), is from *renes* (5b), and *vavassor* is *vas sortitum ad valetudinem* (5b). He also follows the Roman jurists in saying specially that *servus* is *a servando* and not *a serviendo* (4b). The two most remarkable among the numerous attempts of Fleta are *wapentakia* and *impedire*. The first is equivalent to *armorum confirmatio, tactare* being

[1] *Lexicon Juridicum* and *De Verbis Feudalibus*, both Geneva, 1684.

[2] Cited in Spence, *Equitable Jurisdiction*, 335,

used for *confirmare* (ii, 61). The second has *pes* for its root, thus signifying *ponere pedem in jus alienum* (v, 16). One of Britton's is as bad as Isidorus' *codicillum.* Not being very familiar with Roman procedure, but determined to explain the dark matter, he says that *actio familiæ hersciscundæ* was so called from a lady who was a party to such an action, and that it is *accioun de la mesnee dame de Hersciscunde* (iii, 7). Littleton, though in this matter quite overshadowed by Coke, has a few of his own. Among them are fealty (s. 91), socage (s. 119), and parceners (s. 241). Fortescue seems to have only one, *sacerdos* from *sacra dans* (c. 3).

Coke was as prolific in etymologies as he was in maxims, and that is saying a good deal. The maxims, however, are always of at least respectable appearance; some of the etymologies are very wild.[1] They occur in all the books of the *Institutes,* though mainly in the commentary on Littleton, and are not unknown in the Reports. Some are obviously correct, some as obviously incorrect, some are doubtful. Occasionally he has an alternative etymology, as in steward and seneschal (Co. Litt., 61a), and denizen (129a). Little exception can be taken to such derivations as those of brief (Co. Litt., 73b), chevage (140a), demurrer (71b), discontinuance (325a), estoppel (352a), homage (64b), marshal (74a), mayhem (126a), mise (294b), pannel (158b), purpresture (277b), tail (18b), waste (52b), and many others. But what is to be said of admiral as *aen mere al,* over all the sea (260b), bastard as base aërd, *aërd* signifying nature (244a), *curiæ* from *cura* (58a), denizen as—one of the derivations given—*deins nee* (129a), felony as *crimen felleo animo perpetratum* (391a), forest as *feresta,* as in the *Dialogus* (233a),

[1] Whether Coke was indebted to Sir John Skene (Lord Curriehill), cannot be determined. Skene's *De Verborum Significatione* was published at Edinburgh in 1597. Probably Coke and Skene, as well as John Minshen, drew from common sources. The latter's *Guide into the Tongues* (London, 1625) has, as part of the long title, "an exposition of the terms of the law of this land," no doubt based on the *Termes de la Ley.*

gavelkind as gave all kind (140a), maxim *quia maxima est ejus dignitas et certissima auctoritas atque quod maxime omnibus probetur* (11a), parliament as *parler la ment* (110a),[1] *possessio*, with Bracton, as *pedis positio* (15b), robbery as *de la robe* (288a), steward as ward of a stewe or stede, both signifying a place (61a), *villa* as *vehilla, quod in eam conferuntur fructus*, and *vicus* as being *prope viam?* In the second book of the *Institutes* there are not very many. *Wapentagium* (99), is more than doubtful, so is withernam (141). It is doubtful whether the *vee* of the *Mirror of Justices* can be *vetitus (ib.)*. Modern opinion seems in favour of the old French *varech* being derived from wreck rather than wreck from *varech* (167). Force being synonymous with *fortia* is probably right (182). Fair from *forum* (221), and *nonna* from *non nupta* (436), are just as probably wrong. In the third and fourth *Institutes* are some very curious etymologies. In *Inst.* 3 come burglar from burgh laron, house-thief, embring days from embers or ashes, misprision from *mespris*, contempt, pillory from *pilastre*, a pillar, roberdsman from Robin Hood.[2] Ordnance from ordinance seems in accordance with modern views. *Inst.* iv derives *assertum* from *ad, sero*, or from *essarter*, constable from kinge stable, *columen regis*, hustings from *hus*, a house or bench, and things or causes, *i.e.*, a Court for hearing causes, leet from *gelathian*, to assemble, and staple from *estape*, a market. There are also derivations of trailebaston, marshal, and many others. The etymology of Star Chamber gave Coke much trouble. In 4 *Inst.*, 66, he tries his hand at four, inclining to it being so called because the roof is ornamented with golden stars. The others are from *stellionatus*, because *crimina stellionatus* are tried there, from *steeran*, because this Court doth steer and govern the ship of the commonwealth, and, last, because it is full of windows. The best example of etymology

[1] The same mistake is made with testament, the *testatio mentis* of the *Institutes* and Bracton is followed.

[2] He seems to have changed his mind since the "robe" of Co. Litt., 288a.

in the Reports is *Bredimans Case* (6 Rep. 57b), where *possessio* and *seisina* are both derived from *sedeo*.

A very mine of etymology, largely based on Skene, is *Cowell's Interpreter* (1607), a work which had a history, as students of Constitutional History know.[1] Only some of the more curious can be set out in this place. Abbot is from *abba*, father, abet from *bouter*, abeyance from *abayer*, to bark, agist from *gist*, meaning *jacet*, apprentice from *aprenti* or *apprendre*, essoine is *causarius miles*, estreat is *extractum*, mainour is from *manier* or *amener*, *mulier* (in its masculine sense, as in *mulier mulieratus*) is *melior*, team is from *than*, a serf, vassal is *bassallus, id est, inferior socius*. "Widow" troubled Cowell a good deal, she is either *vuide, quasi privata atque orba marito* or from the Etruscan *iduare*, to divide, *quasi a viro divisa*. Some of these are no doubt good, for Cowell as an etymologist appears to be in advance of his age.

It should be noticed that Francis Bacon has no etymologies of interest, though his namesake and predecessor, Roger Bacon, sometimes tried his hand with no great success, *e.g.*, πόλις is *a polo quod est versor*.[2]

Sir Henry Spelman's *Glossarium Archaiologicum* (1684) is much above earlier works in scientific feeling. Still some of the derivations are very quaint. Admiral, always a troublesome word with the earlier etymologists, is from ἁλμυρίς, because he sails on the sea, or from *amir*. The former arrives by a different route at the meaning now generally accepted, *viz.*, *amir-al-bahr*, ruler of the sea. Champerty is from *campi particeps*, *homologus* and *homo ligius* are the same, *pannagium* is from *panets*, parsnips, and *vavassor* is *valvassor*, from *valva*, a door, because he defends the King's doors.

Blackstone seldom or never frames his own etymologies;

[1] It was declared by proclamation to be "a pernicious book made against the honour and prerogative of the King and the dignity of the Common law of this land." The obnoxious passages do not appear in the editions of 1637 and 1672.

[2] See E. Nolan and S. A. Hirsch, *The Greek Grammar of Roger Bacon* (Cambridge, 1902).

he generally adopts those of Bracton, Coke, or Spelman.[1] It will be sufficient to mention some of the more important ones; they will readily be found by reference to the index. They are arson, *chirographa*, *comitatus*, duke, marquess, and earl, eloigned, estovers, estrepement, formedon, hanaper, issue, larciny (*sic*), murder, pound, replevy, suit, trithing, umpire (*impar*), venue, voucher.

Text-writers have not yet quite abandoned etymology. In the well-known work of Sir F. Pollock and Professor Maitland there are derivations of *esplees*, owner, and seisin, besides discussions of the confused etymologies of *pes* and use. These will readily be found by those interested.

In several instances etymology has been applied by the Courts as an aid to decision. In trade-mark cases, especially, it has often been necessary to use etymology in order to determine the meaning of some fancy word. Among the latter are *Siegert* v. *Findlater*, 7 Ch. D. 801 ("Angostura"); *Re Apollinaris Co.'s Trade Mark* [1891], 2 Ch. 186 ("Apollinaris"); *Re Sir Titus Salt & Co.'s Application* [1894], 3 Ch. 166 ("Eboline"); *Re Waterman's Trade Mark*, 39 Ch. D. 29 ("Reversi"); *Re Uneeda Trade Mark* [1901], 1 Ch. 550 ("Uneeda"). Among cases other than those affecting trade-marks are *Howe* v. *Smith*, 27 Ch. D. 101 ("earnest");[2] *Earle* v. *Rowcroft*, 8 East 126 ("barratry"); *Re Athill*, 16 Ch. D. 211 ("collateral"); *Upton* v. *Townend*, 17 C. B. 30 ("eviction").

There is still an opening for the etymologist whose tastes lead him to research in the derivation of legal terms. Instances are: average, earnest, leet, liege. Early etymologists were hampered by their knowing only one language, or at most two; this difficulty has disappeared in modern times.

JAMES WILLIAMS.

[1] Mr. Justice Christian in his Edition of Blackstone sometimes is his own etymologist, not always with success, *e. g.*, allod is *all hood.*

[2] See as to this 2 *Pollock and Maitland*, 206.

II.—THE CRIMINAL RESPONSIBILITY OF THE INSANE.

(*Continued from page* 206.)

Impulsive insanity may be roughly divided into *two* main groups:—

(*a*) Where the deed is apparently the result of a sudden mental convulsion.

(*b*) Where the deed is apparently the result of a more or less deliberate scheme.[1]

First those cases which fall under (*a*).

R. v. *Brixey* (1845).[2] A servant girl was charged with the murder of an infant. She had procured a knife, and in the absence of the nurse had cut the child's throat. She then went and told her master. She was quite conscious of what she had done and was disturbed about what would happen to her. There was no evidence of any delusion. She bore a good character, and it was shown that shortly before the occurrence she had suffered from amenorrhœa (disordered menstruation). She was acquitted on the ground of insanity. Says Dr. Taylor, in commenting on this case: "The existence of legal insanity was in this case an inference based solely on the act committed and on the mode in which it was committed. Many cases where there was not a whit better evidence as to the existence of insanity have met with a different fate."

The chief points to note here are:—

(1) The case was one of insanity without delusion, despite which the prisoner was acquitted.

[1] These cases are difficult to distinguish from cases of pure moral insanity. There is undoubtedly a measure of moral perversion; but the agent is not so dead to moral feeling, and more under the influence of emotional disturbance than in cases of moral insanity.

[2] Cited by Taylor, *Medical Jurisprudence*, 577.

(2) The acquittal was in direct defiance of the knowledge test.

R. v. *Burton* (1848).[1] The prisoner was indicted for the wilful murder of his wife by cutting her throat with a razor. He had, he averred, no quarrel with her, but one morning, having contemplated suicide, it came into his head to kill first of all his wife and child. The wife got away and rushed to the window, calling for help, so he killed the child first, and then cut the wife's throat. Then he tried to kill himself and failed. According to the surgeon, the act had been committed in consequence of an uncontrollable impulse. The prisoner exhibited no sorrow or remorse, but stated that trouble and dread of poverty and destitution had made him do it, fearing that his wife and child would starve when he was dead. He had made no attempt to escape. It was proved that the prisoner had suffered severe pecuniary losses not long before, and that they had produced a decided effect upon his mind. The old knowledge test of right from wrong was emphasized by Park, B., in summing up: "Did he know the nature and character of the deed? And if so, did he know that it was wrong?" "Was the impulse one which altogether deprived the prisoner of the knowledge that he was doing wrong?" The judge further said: "It was difficult to see how they could establish the plea of insanity in a case where there was a total absence of delusion." The implied assumption that insanity without delusion[2] was for all practical purposes outside the law, and the insistence on a test which, as applied to an alleged irresistible impulse, evades the real issue, not unnaturally resulted in a verdict of guilty. Although sentenced to death, Burton was, as a matter of fact, reprieved, which is

[1] *Cox's Criminal Cases*, 275.

[2] In all these references to insanity without delusion, is implied what the law calls "lunacy," or what used to be called partial insanity; not insanity so overwhelming as to produce complete dementia, or a congenital condition such as idiocy. *Vide ante*—Classification.

a significant testimony to the injustice of the verdict. Indeed, to ask whether "The impulse was one, &c." (after having heard the surgeon's evidence) was not only objectionable, but scarcely even intelligible, for the natural effect of an impulse is as a rule rather to weaken the power of control than to cloud the reason. It were as sensible to ask whether the impulse to scream prevented a man from thinking that screaming was an unduly excitable expression of emotion.

Mr. Justice Blackburn mentions a case[1] where he found it necessary to direct a jury that there were exceptional cases, and asserted that if he had given them the rule in *MacNaughten's Case* (dealing with the knowledge of right from wrong), they would have brought in a verdict of not guilty in defiance of it.

R. v. *Pate* (1850).[2] The prisoner was arraigned for assaulting the Queen. There was no evidence given of delusion, but evidence was given of the fact that the accused suffered from sudden impulses of passion. The necessity of proving delusion was even more clearly set forth in this case. Said Alderson, B., "The only insanity which legally excused the man for his acts was that species of delusion which conduced and drove him to commit the act alleged against him." The judge then proceeded to lay down the right and wrong test. The prisoner was convicted. Whether the evidence as to prisoner's insanity was satisfactory is admittedly doubtful.[3] The chief thing to note is the familiar trend of the judicial instructions to the jury.

R. v. *Haynes* (1859).[4] The prisoner was charged with the

[1] Report Select Committee, 1874. A woman who had been several times insane (principally brought on by suckling her child too long) killed a girl whom she was in charge of, and would have killed her own child. only child pleaded. She knew right from wrong, and the character of her act.

[2] *Medical Gazette*, Vol. 46, p. 152. *Journal of Psych. Med.*, 1850, p. 537.

[3] Winslow, *Journal of Psych. Med.*, 1859, 445.

[4] *Fostor and Finlay Rep.* 666.

murder of a young woman. No motive was assigned. Evidence was given that certain events which had happened in the past, quite unconnected with the particular tragedy, had strongly affected the prisoner's mind. Bramwell, B., after reading the answers in *MacNaughten's Case,* thus treated the question of irresistible impulse:—"If an influence be so powerful as to be termed *irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it.*" The judge then went on to enumerate these safeguards, "The restraint of religion, of conscience, and of law." What the precise value is of any safeguard with reference to an irresistible impulse or influence, it would be hard to say. Probably as efficacious as if, in the case of a man suffering from uncontrollable convulsions, one stood by his side and admonished him to be quiet. "It is really wicked of you to wriggle so, for you are disturbing other people's nerves," says the religious adviser. "You are only harassing your friends by these exhibitions of pain," says conscience. "You will assuredly be punished, if you aren't quiet," says the policeman. Farcical though this illustration may be, it is not a whit more unreasonable or unjust in principle than the learned judge's remarks. It is interesting to compare with such a statement the admirable and fair-minded remarks of Mr. Justice Stephen upon the same subject.[1] Yet until the criterion of power of control is authoritatively laid down, every judge will deal with the subject of irresistible impulse necessarily as his own temper and habits

[1] *History of Criminal Law*, II, 170. The man who controls himself refers to distant motives and general principles of conduct, and directs his conduct accordingly . . . The power of self-control must mean a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration, and a disease of the brain which so weakens the sufferer's powers as to prevent him from attending or referring to such considerations, or from connecting the general theory with the particular fact, deprives him of the power of self-control . . . If this can be shown to be the case, I think the sufferer ought to be excused.

of mind suggest. It is scarcely surprising that in this particular case the jury brought in a verdict of guilty.

Secondly, those cases which fall under (*b*).

R. v. *Vyse* (1862).[1] The prisoner poisoned her two children, and was about to cut her own throat with a razor, when she was interrupted. The evidence showed an entire absence of motive, but considerable deliberation and premeditation in accomplishing the murder. A great deal of insanity was shown to have existed in the family. Dr. Hood, of Bethlehem Hospital, said she was insane and irresponsible. According to Dr. Forbes Winslow she suffered from paroxysmal insanity. Referring to the history of the prisoner, he had no hesitation in saying it was an outburst of insanity and not passion only. Wightman, J., commented on the entire absence of motive. If they believed she was in such a state of mind when the act was committed as not to be able to distinguish between right and wrong, they ought to acquit her on the ground of insanity. Jury absent for five minutes: verdict, not guilty.

The old test was once more laid down with strange inappropriateness in a case such as this, attended by signs of deliberation and an apparent consciousness of the criminality of her intended act. But the insanity of the prisoner was so clear, she was so deeply affected by inherited mental taint, that the jury acquitted her on the ground of insanity.

R. v. *Edmunds* (1872).[2] This case was similar in character to the preceding one. Once more there was an absence of motive, yet a certain amount of premeditation. There were no delusions. The prisoner was convicted, as probably she ought to have been upon any ordinary interpretation of the knowledge test. However, upon inquiry it was found that there was an extraordinary amount of mental disease in the

[1] 3 *Foster and Finlay*, 247.

[2] Central C. C., Jan., 1872. Cited by Taylor, *Medical Journal*, 561.

family. Her father was a homicidal and suicidal maniac, her grandfather suffered from cerebral disease, her brother was an epileptic idiot, and she herself had suffered some years previously with hysterical paralysis. On the strength of this hereditary taint her sentence was subsequently commuted.

Impulsive Insanity and Criminality.

A question of serious practical importance will always arise in cases similar to those which have been just considered, namely, how to distinguish the acts of one suffering from impulsive insanity from the act of a sane criminal. Esquirol gives certain tests, which are the result of his study upon this subject:—

Ordinary Criminal.	Person suffering from Impulsive Insanity.
1. Motive—though not always discovered.	No motive.
2. Accomplices.	Want of accomplices.
3. Dislikes victims.	Fond of the victims in question.

These tests are obviously intended to apply only to cases of impulsive insanity unattended by delusion; for where delusion is present, there is certainly a very clear motive existing, due to the insane delusion. Moreover, on the strength of the delusion (*e. g.*, of persecution), there is certainly no friendly feeling evinced for the victim (*vide Prince's Case, ante*). They are, however, helpful in studying such cases as come under subdivision (*a*) of impulsive insanity (*vide R.* v. *Brough*). No hard and fast lines of demarcation can be arbitrarily laid down, and these of course must merely be taken as provisional guides. Griesinger points out[1] the danger (a danger into which many physicians have certainly run) of making the deed itself the distinctive mark

[1] *Mental Pathology*, 119.

of an abnormal mental state, and argues that in order to prove that the origin of the deed proceeded from mental disease, endeavours must be made to establish before, exclusively and quite independently of the deed itself, the marks of insanity according to origin, symptoms and course. There are exceptional cases in which this is impossible, but, as a general rule, this, thinks Griesinger, is the line to be adopted.

The cases just cited might easily have been multiplied, but even these few may, perhaps, show both the insufficiency of the knowledge test and the discordance of judgments arising in the application of the same. No doubt in a great many cases, were the knowledge test broadly enough construed, any serious miscarriage of justice would be, so far as possible, prevented. If every judge held, like Stephen (*vide R.* v. *Davies*), that any disease "which so disturbs the mind that a man cannot think calmly and rationally of all the different reasons to which one refers in considering the rightness or wrongness of an action—any disease that so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason—may be fairly said to prevent a man from knowing that what he did was wrong;" or held with Pitt-Lewis that the knowledge should be construed so as to include a power of choice and discrimination, then the controversy between lawyers and physicians would be practically at an end. But this generous construction, however defensible on psychological grounds, has, as a matter of fact, not been accepted by the majority of judges who, in common with juries, interpret the phrase in its ordinary and popular meaning, as merely implying a consciousness of the general character of the act.

Stephen has suggested an important modification of the power of control test, which runs thus in his *Digest of the Criminal Law:* "Unless the want of power of control has

been produced by his own default." The present writer finds himself unable to appreciate the value of this limitation. It seems to him open to this serious objection, that it introduces a new difficulty into an already difficult problem. Hard though it may be to discover whether a morbid impulse may be presumed to be resistible, it is still harder to adduce evidence which tends to show that the mental disease affecting the prisoner's power of control has been produced by his own default. The question is no longer "Could the prisoner have helped himself with reference to a particular act?" but "Could the prisoner, even assuming the impulse to be irresistible, have by proper self-control prevented the disease from arriving at the present uncontrollable culmination?" This is an inquiry into ancient history. And it seems a highly impracticable one. The writer is aware that the suggested rule is a generalisation from *Dove's Case*, but like many generalisations (when disconnected from the particular circumstances which have given them rise) is of doubtful value. An obvious result of its adoption would be to include within the limits of criminal responsibility all cases of recognized alcoholic insanity, where the disease is presumed to have been produced by the prisoner's own fault. Stephen, however, in defiance of his proposed rule, in the case of *R.* v. *Davies*, clearly exempted these cases from responsibility,[1] though such exemption is by no means the rule with other judges.[2] But why stop here? Why not with equal justice exempt a man suffering from the disease called general paralysis of the insane, brought on by sexual excess. To exclude in cases of alcoholic insanity and to draw the line there, seems defensible neither on the ground of fairness nor on the ground of logic. But if you extend exemptions, what becomes of the practical value of the limitation? Besides,

[1] *Vide* also *R.* v. *Baily* (*Times*, 25th Jan., 1886); Day, J., to the same effect.
[2] *Vide* cases cited in *Inebriety* (Kerr), pp. 641, *et seq.*

after all, this limitation merely puts the difficulty of ascertaining what evidence there is of power of control into an earlier stage of the complaint when there is far less prospect of any satisfactory conclusion being arrived at. Even with special reference to *Dove's Case*, the writer fails to see why it could not have been decided upon the knowledge and power of control test. So far as the report of the evidence[1] goes, the verdict against Dove seems to have been a just one. He was insane doubtless,[2] but his knowledge of right from wrong, though not very subtle possibly, was at any rate scarcely in dispute, and the premeditation characterising the poisoning of his wife, together with other considerations, tended to support the belief that the *alleged ir*resistible impulse, though strong, *was resistible*. Then why complicate the matter by saying, even if it were irresistible, he ought to be executed. Once assume the irresistibility, he is surely in the same category as a man who through indulgence in drink gets delirium tremens, under the influence of which he commits a crime. Stephen would exempt the latter (*vide R.* v. *Davies*), then why not the former?

Reference may perhaps be made in passing as to the general trend of the law respecting inebriety so far as it concerns insane persons. The law seems to be that insanity, the remote cause of which is habitual intoxication,[3] absolves (subject presumably to the knowledge test), but insanity, the immediate cause of which is intoxication, does not absolve. It would be impossible, of course, in the present article to discuss so complex a subject as inebriety in its medical and legal aspects, so the writer will content himself by calling attention to the want of care shown by

[1] *Vide General View Criminal Law of England*, Stephen, p. 273, *Case of William Dove.*

[2] Though a man may be both insane and responsible, as pointed out elsewhere in this article.

[3] *Vide* exhaustive discussion of subject *Inebriety or Narcomania* (Norman Kerr), pp. 580—592, in particular.

courts of law in distinguishing cases of inebriety which are the outcome of insanity from ordinary cases of drunkenness. Frequently the insane drunkard is imprisoned each time his insanity expresses itself in a drunken debauch. The mere fact that the offender drinks is quite enough to damn him; no further inquiry is made (as should be the case) into the causation of the inebriety. To treat such persons as wilful criminals instead of diseased beings is objectionable, not only from the moral point of view, but in looking at the deterrent value of penal legislation.[1]

(b) *Moral Insanity.*

As to whether there is any specific mental disease characterised only by moral perversion, and not allied with some measure of intellectual disorder remains a problem upon which even experts in mental disease are at variance.[2] But all agree that a condition of mental disease does exist in which a defective moral sense is the most prominent

[1] Except in so far as may show whether he was an habitual drunkard, in which case he *may* be sent to an Inebriates' Reformatory, *willing* to receive him.—Inebriates' Act, 1898. This not necessarily in substitution of any other sentence. Penological, preventive principles (Wilton, Tallack, Howard Association, 1896, p. 141), "During the last decade of the 19th century, there has been a mischievous tendency on the part of many magistrates in England, Scotland and Ireland, to send insane or doubtfully sane offenders to prisons, instead of to lunatic asylums. The Prisons Commissioners for all these parts of the kingdom have had to complain of this." Insanity arising from the abuse of drugs, such as morphia and cocaine, has of late years become a problem of serious legal importance. Since writing this article the author has seen a valuable addition to the medico-legal study of this subject in *Morphinism*, by Dr. Crothers (1902). Trustworthy literature on this subject is so scanty that Dr. Crothers' book is of special significance and value.

[2] *Cf.* Articles, Tuke, *Psychological Dictionary of Medicine* (recognising moral insanity); Hamilton, *Legal Medicine* (against moral insanity); Maudsley, *Pathology of Mind*, and *Responsibility in Mental Disease* (recognising); Quain's *Dictionary of Medicine* (Blandford); Forbes Winslow (recognising); Dr. Pritchard, who invented the term, defined moral insanity as a disorder which affects the feelings and affections, or what are termed the moral powers, in contradistinction to those of the understandtng and intellect. Generally speaking, medical opinion on the subject has been modified since first moral insanity was advanced by Pritchard, Ray, and Esquirol.

symptom, and most agree that in certain cases the moral perversion is the primary indication of insanity, though sooner or later it is attended by other signs of mental disease. The difficulties besetting the question are naturally not so much with regard to the abstract possibility of such cases, as in the proof of the actual existence, when set up, as justifying exemption from responsibility. The balance of medical opinion seems to be in favour of moral insanity being pleaded, *only* when all the circumstances of the case and the antecedents of the offender being considered, a medical presumption is created that the prisoner is not responsible for his acts. Dr. Taylor,[1] whose excellent argument against the unrestricted admission of this plea in criminal cases it would be difficult to dispute, surely, however, rather goes out of his way to ask, "What is crime but an act arising from the perversion of the moral feelings?" He could scarcely mean to suggest that it should make no difference whether the perversion be produced by disease traceable to hereditary tendencies, &c., or be *merely* due to deliberate wilfulness. A serious illness, or the physical shock consequent on some accident[2] has been known to entirely alter the temperament and moral disposition. Facts such as these, it is suggested, ought to be taken into consideration, for they help to determine whether in a certain case a crime is due to moral insanity or depravity. Of course, it is quite possible to take up the position that such people, whether depraved or insane, must be treated like vermin and destroyed. But a position like this, not only outrages the moral sentiment of the community, but renders the deterrent value of penal procedure of small account. In the notorious case of Burton[3] who was

[1] *Medical Jurisprudence* (Taylor).

[2] *Vide* case cited by Forbes Winslow, *Diseases of the Brain*, pp. 127-8, Ray and Wharton also cite cases.

[3] 3 Foster & Finlay, 772.

executed for a particularly atrocious crime, the prisoner deliberately committed the murder, not because of any personal ill-feeling which he bore to the deceased, but because of a morbid desire to be hanged. To hang such a man may get rid of an undesirable individual, but would surely only serve to encourage other Burtons afflicted with a like insane and preposterous desire. Burton gave himself up and admitted the act. The evidence showed a feeble mental organization. He certainly seemed to have been conscious of what he was doing, namely that he was killing a boy, and would be hanged for the murder, but he certainly did not fully appreciate the hideousness of his action, and expressed neither sorrow nor surprise for what he had done. The medical evidence was to the effect that he knew what he was doing,[1] but had no control over himself. There seems little doubt, from a consideration of the case, that Burton was insane, and the proper issue to have been raised was, it is submitted, "Could he help doing what he did?" Although there was no dispute about his knowledge, the judge, Wightman, J., insisted upon this (*i. e.* knowledge) as the true test, and declared, "A man is responsible for his actions, if he knows the difference between right and wrong." When a boy, Burton was crazy and sometimes violent; his mother had been in an asylum, and his brother was of weak intellect. In fact, the evidence as to his insanity seems to have been much stronger than in some cases where the prisoner was acquitted.[2]

Moral insanity frequently precedes general paralysis,[3] and is often connected with epilepsy.[4] In certain cases epilepsy apparently leaves the sufferer, who subsequently presents a

[1] Using the word "known" in its popular sense.

[2] *Vide R.* v. *Brixey*, *ante* 84; *R.* v. *Prince*.

[3] Blandford, *Insanity* (Quain's *Dictionary of Medicine*).

[4] *Vide* Forbes Winslow, *Diseases of the Brain*; Hack Tuke (*Dictionary of Psychological Medicine*); Maudsley's *Pathology of Mind*, *Responsibility in Mental Disease*.

complete moral transformation. The physical convulsions seem to have given way to mental convulsions. People of amiable and virtuous dispositions become violent and evilly disposed; there is often an outbreak of homicidal mania, which is really an expression of what has been called "masked epilepsy." The fact, then, of the prisoner having suffered from epilepsy, is a fact to be taken into consideration in determining whether any particular case is one of depravity or moral insanity, though the presence of epilepsy, it is necessary to add, is by no means incompatible with sanity, and it is incorrect to assume that because a murderer has suffered from epileptic fits, he is *ipso facto* irresponsible.[1]

There are other cases, where a condition of moral perversion (unmarked by other mental disorder) has preceded epilepsy. Dr. Winslow[2] recounts a case where an amiable and accomplished woman suddenly manifested a complete moral change, but for a considerable period there was no apparent intellectual disturbance. Subsequently, however, she entertained delusions as to her husband's fidelity, and this new phase of the malady was shortly followed by an epileptic seizure and partial paralysis.

Clearly, then, there are cases of moral perversion (unattended, at any rate in early stages, by intellectual disorder) traceable to physical disease; and it is submitted that such cases are not to be dismissed by the lawyer as unworthy of consideration. The mental tone of the sufferers is so vitiated by disease, that they may be irresponsible for their actions.

No rule can be laid down, or infallible test be suggested, to distinguish moral insanity from depravity, but every alleged case must be decided on its own merits, and it should be a question to be decided by the jury whether, even granting moral insanity, there was evidence which showed

[1] *Vide* Maudsley, *Responsibility in Mental Disease.*
[2] *Diseases of the Brain*, p. 126.

a deficient power of control such as might negative the presumption of responsibility.

RETROSPECT AND PROSPECT.

Sufficient has been said, it is hoped, to indicate how unsatisfactory and inadequate is the knowledge test formulated in the historic Answers. The interpretation usually placed by the jury upon the "nature and quality" and "wrongness" of the act, is that the prisoner possessed a general consciousness of what he was about. It may be admitted that a subtler construction of this test, such, for example, as Mr. Justice Stephen would have accorded it,[1] would possibly render the proposed additional power of control test superfluous. But these small niceties, these fine shades of meaning extracted from the word "know," are so obviously intended to take the place of a felt deficiency. Is it not better to allow the knowledge test to carry its ordinary meaning and to supplement it? Psychological niceties do not appeal to the ordinary jury. Since there is abundant evidence, not only from expert observation, but from the confessions of the insane themselves, that many insane people appreciate the moral quality of their actions, though they lack the power to control them, it should be clearly laid down (not left for the judge to interpret at his discretion), that the word knowledge connotes the power of control, as well as the faculty to discriminate and appreciate, or else in addition to the knowledge test that of power of control should be superadded.

At present, it is submitted, the principles of the law as laid down by the rules in *MacNaughten's Case* receive very rarely the broad construction placed upon them by Stephen and Pitt-Lewis. There have been notable cases where an insane offender was acquitted in defiance of these rules,[2] the

[1] *Vide ante.*

[2] *Vide ante, R.* v. *Brixey, R.* v. *Vyse, R.* v. *Prince,* &c.

insanity being apparent to judge or to jury or to both, but the very fact that verdicts are brought in quite disregarding the knowledge test, points the more emphatically to the necessity of some alteration. Not merely has the cry for alteration come from the medical profession, it has come from the judges themselves. Lord Cockburn[1] said anent the proposal in the Homicidal Law Amendment Bill (1874), to introduce as a test the absence of the power of self-control:—"I concur most cordially in the proposed alteration of the law, having been always strongly of opinion that, as the pathology of insanity abundantly testifies, there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse." Lord Coleridge is reported to have said[2] that he considered judicial decisions in questions of insanity were bound by an old authority which by the light of modern science was altogether unsound and wrong; Mr. Justice Hawkins (1885), whom none would criticise on the ground of being too sentimental as regards criminals, commented[3] on the unsatisfactory condition of the law, and said that a better definition of what constituted a defence on the ground of insanity was wanted.

Sir James Stephen's views have already been referred to. Mr. Justice Blackburn objected to the law as to insanity being codified,[4] not because he thought the rules in *MacNaughten's Case* are satisfactory, but because he wished the matter to be left to the discretion of the judges, and did not wish them to be hampered by rules. The author is of opinion that to leave a difficult subject such as insanity with

[1] *Vide Memorandum of Lord Chief Justice to Report of Homicidal Law Amendment Bill*, 1874.

[2] *Western Morning News*, Feb. 28th, 1891, cited by Dr. Orange (*Dictionary Psych. Medicine*).

[3] *Shrewsbury Chronicle*, Jan. 23rd, 1885.

[4] Homicidal Law Amendment Bill (1874), p. 46.

no better guide than the rules in *MacNaughten's Case* to the temperament of individual judges is undesirable, and, —as Mr. Justice Stephen said,—"for the public it is very much better that the law should be distinct and certain."

The author submits that the law as to insanity should be amended (by what method is subsequently suggested) in some such direction as indicated below:—

No act is a crime if the person who does it is at the time prevented either by defective mental power or by any disease affecting his mind—

(*a*) From foreseeing the natural and probable consequences of his act; or

(*b*) From knowing the legal significance of his act; or

(*c*) From knowing the moral quality of his act; or

(*d*) From controlling his own conduct.

There is no dispute about (*a*) and (*b*) exempting from responsibility. Some difference of opinion exists even now —though less than formerly—about (*c*). It is, however, generally conceded. (*d*) however, which, it is submitted, is fully as important as the other tests, has been nearly always overlooked and condemned by lawyers. Even Stephen, the most strenuous of legal reformers, would limit it.

What form should this proposed alteration take?

One of three ways is possible. The following is merely a re-statement of possible methods already advocated by various writers: and each has found supporters amongst those who are not satisfied with the law existing:—

(1) The present rules may be rescinded, and the Courts left free to apply the general principles of the Common law (as gathered from past decisions) to the altered circumstances of the times.

(2) The subject may be treated by an Act of Parliament.

(3) A test case may be sent up to the Court for the consideration of Crown Cases Reserved, in order that this Court may re-state the law in more comprehensible form.

1.—This, it is submitted, would leave too much to the idiosyncrasies of the particular judge and jury. Verdicts would be more uncertain than ever. The subject is too complicated and the issues involved often too serious for such a hap-hazard way of settling the difficulty. Besides, there would, of course, be no guarantee that the power of control test would receive any recognition. Though the author believes that it is not inconsistent with the principles of the Common law, many might contend otherwise.

2.—A Bill dealing with a high controversial subject, such as the criminal responsibility of the insane, would probably rouse all the faddists and sciolists (to adopt J. S. Mill's phrase) in Parliament, and—as in many other cases—it is highly probable that the Bill, if it ever emerged into a full-blown Act, would be so mutilated as to be practically ineffective: otherwise this method, *prima facie*, seems the most satisfactory, as it would certainly be the most authoritative. But past experience has shown also how unable Commissions and Select Committees are to agree together upon some draft scheme. Since 1843 the subject has been thrice brought up for consideration—once in 1865 by the Royal Commission with reference to the Law of Homicide; for the second time in 1874 by a Select Committee to which the Homicidal Law Amendment Bill was referred;[1] and finally in 1879 by a Royal Commission. The chief point on which all these Commissions were agreed seems to have been that the subject was a very difficult one, a

[1] Baron Bramwell and Sir James Stephen took widely differing views both on the question as to whether wrong should mean legal or moral wrong, and on the question of self-control. *Vide* Report Select Committee, Homicidal Law Amendment Bill.

conclusion which might have been arrived at even without the intervention of such a body of sages. In each case the subject after discussion was postponed for further inquiry, and in the Draft Code (1879) the power of control test found no place whatever.

A Bill, then, does not seem the most expeditious way of effecting a modification in the law. On the whole, it is submitted, the third proposition seems likely to afford the most satisfactory results.

A test case, *e. g.*, one where the prisoner has committed a murder, and it is set up by the defence that he is suffering from some form of impulsive insanity and was actuated by an irresistible impulse. The judge may then state a case on a point of law for the Court for Crown Cases Reserved. On this case the Court for Crown Cases Reserved will give their judgment.

As to the particular form which the proposed alteration should take, any rules laid down should emphasise the qualification of the power of control as one of the essentials of responsibility.

It has been asserted in medical quarters[1] that the question which ought to be put to the jury in all these cases is: "Was the act the offspring of mental disease?" assuming that wherever mental disease is proved to have existed the offender *ipso facto* should be exempted from responsibility. By this simple means its advocates cut the Gordian knot of difficulty, and avoid troublesome inquiries into how far an impulse is or is not resistible. They seem to argue that the effects of mental disease being so obscure, and the question of responsibility being so difficult to ascertain, it is simpler to exempt one and all for fear of doing injustice. Thus all insane persons would be accounted irresponsible. To this, however, the present writer cannot agree. In the first place, an examination of medical opinion

[1] *E. g.*, Dr. Sach's *Hamilton's Legal Medicine.*

on the subject seems on the whole to uphold the inference that insanity as such is not incompatible with knowledge and self-control. Says Dr. Maudsley:[1] "A practical experience of the insane teaches us what a power of self-control even they sometimes evince when they have a sufficient motive to exert it. The fear of suffering by yielding to their insane propensities suffices in many instances to hold them in check . . The description of cases of homicidal and suicidal mania . . . show how even desperate insane impulses have been successfully resisted for a time in some instances and resisted altogether in other instances."

Such an admission as this coming from one of the most uncompromising pleaders for the legal recognition of Affective (emotional) Insanity is of considerable weight. To ask the jury whether the act is the product of mental disease is to assume that mental disease *ipso facto* exempts from responsibility, an assumption which even a radical like Dr. Maudsley will not admit.

With regard to the constitution of the jury to which such important issues are left, it would be idle to pretend that the average British jury are competent to decide upon such delicate and difficult problems as those which often confront them. Men better trained to weigh medical evidence and to decide on nice points of psychology are certainly required. "My experience," said Sir James Stephen,[2] "is that juries are usually reluctant to convict if they look upon the act itself as a wholly mad one, and to acquit if they think it was an ordinary crime." It is obvious that such a rough and ready test is scarcely likely to afford satisfactory results. If, however, the knowledge and power of control test (which has been argued for) were

[1] *Responsibility in Mental Disease*, p. 271. *Vide* also *Sanity and Insanity* (Mercier), pp. 128, 129; Wharton, *Medical Jurisprudence*, pp. 217, *et seq.*, to the same effect.

[2] *History of Criminal Law*, Vol. II.

clearly stated and explained to the jury, the present defect would be to some extent remedied, though a jury specially constituted would be a more desirable mode of trial.[1]

It has been suggested by some that various grades of responsibility should be constituted to meet the various forms of insanity; but even were it possible to lay down such rules as would satisfy the bulk of medical opinion on the subject, such a step, it is submitted, would be undesirable. The law cannot take cognizance of every transient scientific hypothesis; medical views are constantly changing; and upon an obscure subject such as insanity the dogmas of to-day may be the superstitions of to-morrow. All that is possible, therefore, from a practical point of view, is to frame such a general test of responsibility as may be applied to any particular case and may not be dependent upon the accuracy of some special medical hypothesis. Mr. Wilfrid Ward has defended the slowness of the Roman Catholic Church[2] to commit herself to any novel form of thought which seemed at first sight at variance with traditional teaching, and in a like manner English law may be defended up to a point from the imputations of medical critics. Law is not the driving wheel of the machinery of state, but the

[1] Dr. Savage has told the author that in his opinion the jury would be greatly assisted if the *medical expert* was allowed to "explain" to them. The author suggests that perhaps it might be better if, in cases where insanity is set up as a defence, the jury should be presided over by a medical expert (who was not a witness in the case, or called on behalf of the defence) whose business it should be to assist the jury by his special knowledge in deciding on the evidence as to the prisoner's responsibility. Trial by jury, however, is scarcely the best way of dealing with a subject like insanity, often involving, as it does, such difficult scientific questions. The trained mind of the judge should, on the whole, be better able to decide the question of responsibility, than a number of men many of whom presumably have had no previous acquaintance with the problems of insanity, and who, as Stephen said, are largely guided by whether the act seems a mad one. A special jury would be an improvement, and particularly if assisted by a medical commissioner. But it is suggested (although the suggestion is perhaps scarcely practicable) that a judge *acting by himself* would be preferable to judge and jury in such cases.

[2] *Witnesses to the Unseen.*

governor; its duty is to regulate, and its nature is necessarily conservative; none the less the time has surely come when a medical theory, such as the intimate connection between disease and self-control in certain specific cases, should no longer be ignored by lawyers. And in other countries this has been recognized. In Germany the supreme importance of the power of control test has been recognized by the legislature,[1] and in the United States the law—largely derived from the same source as our own—is far more in harmony with the trend of scientific research.[2] In former times we eulogized the English Constitution and treated it (to use Browning's phrase) with "the good strong stupefying incense" of adulation, agreeing with Burke that we ought "to understand it according to our measure, and to venerate where we are not able to comprehend." To-day we are more iconoclastic; we have our Freemans, our Bagehots, our Diceys, who, tearing aside the mystic robe of sanctity, discuss and criticise the anatomy of the Constitution. The result of criticism has been to make our praise less indiscriminate, and whilst we do not expect to find the Constitution, with Burke, the most perfect of human formations, we are for the most part agreed that it is, taken as a whole, admirably suited to the requirements of a liberty-loving, yet conservative-minded people.

So with the Common law. No longer with Coke do we look upon it as "the perfection of reason," but while not unmindful of the fact that it exhibits the condensed common sense of past generations, we are inclined to say with

[1] *German Penal Code.*

[2] *Vide* Wharton, *Medical Jurisprudence* cases, pp. 42—44, 144, 145; also American cases cited by Maudsley (*Responsibility in Mental Disease*). According to Wharton, p. 147, "The present tendency of judicial practice (in the United States) is . . . to tell the Jury that if they believe the act was committed under an involuntary and uncontrollable impulse, the defendant is entitled to acquittal on this particular ground."

Holmes, "The life of the law has not been logic: it has been experience."

The physiological researches of scientists (the influence of heredity, the intimate connection between certain physical diseases and mental phenomena) have for the past fifty years been influencing insensibly public opinion. Tributary streams have helped to swell the flood, and public sentiment on the subject is even now overlapping the old landmarks of the law. No system of jurisprudence will live except it quit the unstable soil of mere legal theory and outworn metaphysic for the sure rock foundation of practical experience.

ARTHUR RICKETT.

III.—SURVIVING ABSURDITIES AND CURIOSITIES OF THE LAW.

"IT hath been an antient observation in the laws of England," observes Blackstone, in commenting on the old doctrine that the law is the perfection of reason, "that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation." The most conservative of lawyers would now readily admit that Blackstone was far too patient of eighteenth century abuses, but the general opinion is, that the energetic reformers of the nineteenth century have left little or nothing for the twentieth to accomplish, except in the direction of consolidation of Statutes, codification of Case law, and Statute law revision as hitherto carried on.

The purpose of this article is to show, by a collection of salient instances, that the general opinion is very far from

correct. It is not until some patent grievance has actually occurred in practice that English law gets altered. As the late Lord Chief Justice Cockburn once declared in Court in the hearing of the writer, the English people, though quick to remedy what has become too hard to bear, are quite ready to wait until it has actually become so, and have no taste for theoretical reforms or scientific systems.

"The profession," observed Sir James Mansfield in 1813, "have always wondered at *Dumpors' Case;* but it has been law for so many centuries that we cannot overrule it;" and it was not until 1859 that a Law of Property Amendment Act swept away the absurd old rule of that case, by enacting that a licence to assign extends only to the permission actually given by it. For hundreds of years the proviso for re-entry in a lease by its general applications to even the smallest breach of covenant afforded endless opportunities for extortion; and yet it was not until 1881, after the mortgagee of a lease had lost all that he had advanced upon it, that the Conveyancing Act enabled our Courts to grant equitable relief against forfeiture for causes other than non-payment of rent. Nor was it until after twenty-five partial and minute statutory alterations of the law of Evidence that the general Criminal Evidence Act of 1898 was passed to make the evidence of an accused person admissible in his own defence.

A few of the most prominent of our remaining absurdities will now be stated.

Marriage.—The law of this most important of contracts, curiously inconsistent as regards age with that of the Criminal Law Amendment Act, which makes unresisted intercourse with a girl below sixteen a crime, still allows marriage between a boy of fourteen and a girl of twelve. No doubt by requiring publication of banns and consent of parents or guardians much has been done to restrict such marriages; but it is equally beyond doubt (1), from *R.* v. *Birmingham*

([1828], 8 B. & C. 29; 32 R. R. 332) that a marriage of minors without the required consent is valid; and (2), that the required consent might legally be given to a marriage even at the earliest legal ages with results only too likely to be disastrous to the poor young spouses.

The law of breach of promise of marriage is also very strange. Its defect in allowing unlimited damages—a defect which the late Lord Herschell for so many years vainly endeavoured to put right—is too well known to dwell upon. Another and more startling defect is, that although ten pounds worth of goods cannot be sold without a writing signed by the party to be charged, and although the Statute of Frauds requires "an agreement in consideration of marriage," to be in writing so signed, the mere promise to marry need be in words alone. Curiously enough, the first decision upon the application of the Statute of Frauds, *Philpot* v. *Wallet*, 3 Leon. 65, was to the exact contrary; and as the late Mr. Joseph Brown, K.C., pointed out to a Parliamentary Committee in 1875 (it is submitted with absolute correctness), the promise of the one party is in consideration of the other's promise, and therefore there is an "agreement in consideration of marriage." But the heavy weight of decisions, little later than *Philpot* v. *Wallet* in point of date but long acquiesced in, would prevail against the common-sense construction of the statute, and the almost invariable existence of confirming letters has stood in the way of the point being raised whether *Philpot* v. *Wallet* was not good law after all.

Compromise of Debts.—If A. owes B. £100, and B., to save the trouble, expense and delay of legal proceedings, promises (without deed) to take or actually takes £90, or any less sum in full discharge, B. may nevertheless successfully sue A. for the unpaid balance as soon as he pleases. Such is the effect of *Foakes* v. *Beer*, 9 App. Cas. 605, as decided in the House of Lords in 1884. Lord Blackburn

had at one time intended to dissent from the judgment, but concurred in it on authorities based on a radically vicious dictum in *Pinnell's Case*, 5 Rep. 117, some 250 years before, with the following remarkable observations;—

"It is my conviction that all men of business, whether merchants or tradesmen, every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued actions on this dictum (as *Pinnell's Case*) as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them. I assent to the judgment proposed, though it is not that which I originally thought proper."

Option of Refusal.—Analogous to the regrettable law of *Foakes* v. *Beer* is that of *Cooke* v. *Oxley*, 1 R. R. 783, where it was admitted in 1790 that "if (as it is put in *Pollock on Contracts*) in the morning A. offers goods to B. for sale at a certain price, and gives B. till four p.m. to make up his mind, yet A. may sell the goods to C. at any time before four o'clock so long as B. has not accepted his offer." Bargains like these are made every day, especially with house agents, and no doubt in the vast majority of cases honourably adhered to.

Banking Law.—The relationship of banker and customer is that of debtor and creditor, with the superadded obligation upon the banker to honour the customer's cheque, with the legal result, perhaps not as widely known to laymen or even to lawyers as it ought to be, that the Limitation Act 1623 is applicable, and can be set up by the banker in defence to any claim by the customer after the expiration of six years. That this is the effect of *Pott* v. *Clegg*, 16 M. & W. 321, and *Foley* v. *Hill*, 2 H. L. C. 28, was clearly recognised in *In re Tidd* [1893], 3 Ch. 154, although money paid into a bank on a deposit account appears to stand in a different

position, the Court significantly observing in *Atkinson* v. *Bradford Third Equitable Building Society*, 25 Q. B. D. 377, that they would know how to deal with such a case when it came before them. However this may be, the present curious situation appears to require legislative treatment. The practice of bankers is believed to be on the one hand not to set up the Statute of Limitations in answer to a proper claim, but on the other hand not to seek for claimants by advertisement or otherwise. In South Australia advertising for claimants has been made compulsory by Statute. Ought it not to be made compulsory in the United Kingdom? If in answer to advertisement, claimants should make good their claims within a reasonable period, they might receive their balances after deducting expenses; if the claims should not be made good, they might be barred and the balances handed over to the Chancellor of the Exchequer.

Leases for Lives.—A lease for the life of the lessee is reasonable enough, but what can be more absurd than a lease for the lives of other persons? The origin of this kind of lease, which is said to be connected in some mysterious way with the feudal system, is lost in obscurity; the reasons for its long continuance—that the lessee could be reinstated upon wrongful eviction, whereas the lessee for years could only recover damages—that the lease conferred a Parliamentary franchise, whereas a lease for years did not—and that the lease for lives was not subject to the lessee's debts—have long ago ceased to operate. And the very best authority for its discontinuance can be found in the Duchy of Cornwall Management Act 1863, 26 & 27 Vict., c. 49 (omitted from the "Statutes Revised" as "Local and Personal"), by sect. 25, of which (see Woodfall's *Law of Landlord and Tenant*, 17th ed., at p. 19) the Duke of Cornwall is prohibited from granting any part of the possessions of the Duchy for the life of any person or for any term of years determinable with lives.

Distress for Rent on Person not Tenant.—So long as goods distrained for rent could not be sold, but had to be held as a pledge, little injustice was caused, as Blackburn, J., points out in *Lyons* v. *Elliott*, 1 Q. B. D., at p. 213, by the power of the landlord to seize a stranger's goods, as a landlord generally gave up the goods as soon as he found that they were not the tenant's, since his continuing to hold them would not induce the tenant to pay. The "very harsh and unjust law" of the reign of William and Mary "held out a great temptation to a landlord to take the goods of a stranger, although he knew they were not the tenant's." Therefore, with certain pretty well-known exceptions, a landlord may seize and sell one man's goods for another man's debt. But the sages of our law are nothing if not able to distinguish, and though money in a bag may be distrained, loose money may not be. The law of distress for a rent-charge is also very odd. The tenants of a landlord who fails to pay the annuity of a jointress can be distrained on for it, although the landlord himself may have distrainable goods close by, and a distraining jointress may not divide levies amongst a plurality of tenants. To do so would be to make a "second distress," and "that," observed Lord Mansfield in *Hutchins* v. *Chambers*, 1 Burr. 589, "is great oppression." See *Owen* v. *Wynne*, 4 E. & B. 579.

Expenditure of Insurance Money on Insured Building.—It is enacted by the 83rd section of the Fires Prevention (Metropolis) Act, 1774 (14 Geo. III, c, 78, so called by the Short Titles Act 1896, though held in *Ex parte Goreley*, 34 L. J. Bank., to be of general application), that when an insured house is burnt down, any person interested (including, it is submitted, either a landlord or a tenant) may procure the insurance money to be expended on rebuilding. But in *Leeds* v. *Cheetham*, 1 Sim 146, a Vice-Chancellor contrived to hold that though the landlord of a burnt down factory had covenanted to repair the outside, had insured the

factory, and had received the insured money, the tenant had no equity to compel the landlord to expend the insurance money in rebuilding, and this decision was approved by Lord Campbell in *Lofft* v. *Denis*, 28 L. J., Q. B. 168. The Statute was not cited in either of the two cases.

Personal Liability of Fiduciaries.—Nothing is more unjust than that trustees, so long as they do their best for the trust property, should be personally liable for damage or loss happening to it. Yet trustees are personally liable, and not only liable out of assets to pay calls on shares in public companies; trustees in bankruptcy, as appears from *Titterton* v. *Cooper*, 9 Q. B. D. 473, may be personally liable on the covenants of a bankrupt lessee; and what is far worse, the executors of a tenant are personally liable on his covenants for repair (which entail an obligation to rebuild in case of destruction by fire), though it is certain that they are not so liable for non-payment of rent, and it is probable that they are not so liable "till after entry." Such is the undoubted effect of *Tremeere* v. *Morrison*, 1 Bing. N. C. 89, and *Sleap* v. *Newman*, 12 C. B., N. S., 116, and wrong as the law of those cases may probably be, it is feared that they have been accepted as law too long for even the House of Lords to over-rule them.

Assignments to Paupers.—The assignee of a lease is liable on the covenants of it; but if he assign over to another, he ceases to be liable to the lessor. Therefore assignees of leases may legally assign over to paupers or other men of straw for the purpose of evading their past liabilities, and a Court of Equity, so far from discouraging trickery like this, has held that an executor of an assignee who does not assign over is guilty of a devastavit, it being not only his legal and moral right so to assign, but his duty as trustee for others. See *Rowley* v. *Adams*, 4 Myl. & Cr. 534.

Similarly, the holder of shares in a public company may assign his shares to a pauper to escape liabilities for calls,

though he knows the shares to be worthless, if only the sale be *bonâ fide*, the transferee be *sui juris*, and there be no resulting trust for the transferor. This rule is too firmly established by *De Pass's Case*, 28 L. J., Ch. 769, and other decisions, to be questioned now. So far as the Stannaries are concerned, it has been very properly swept out of the law by sect. 35 of the Stannaries Act, 1869, 32 & 33 Vict., c. 19, which enacts that "a transfer of shares for the purpose of getting rid of the further liability of a shareholder, as such, for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the expenses of a mine, or to a person in the menial or domestic service of the transferor, shall be presumed to be fraudulent, and need not be recognised." Why should not this enactment be made general?

Corn Rents.—By an Elizabethan statute, 18 Eliz., c. 6 (omitted from the Revised Statutes as "Private," but specially saved so recently as 1800, by sect. 7 of the Ecclesiastical Leases Act of that year, 39 & 40 Geo. III, c. 41), it is enacted that "for the better maintenance of learning, and the better relief of scholars" in the Universities of Cambridge and Oxford, and the colleges of Winchester and Eton, no authorities of those institutions shall make any lease of their lands "except that the one-third part at least of the old rent be reserved and paid in corn, that is to say, in good wheat, after six shillings and eight pence the quarter or under, and good malt at five shillings the quarter or under, to be delivered yearly upon days prefixed." In default of this payment in kind, payment of the value is directed to be paid in ready money, and either the corn or the money coming of the same is to be expended to the use and relief of the commons of the colleges only "and by no fraud or colour let or sold away." "And all leases otherwise hereafter to be" still declares the Legislature "shall be void in all law to all intents and purposes."

Absolute Testamentary Power.—Alone among civilised countries England and Ireland confer an absolute testamentary power upon every man to the complete exclusion, if he pleases, of both wife and children. In Scotland it is far otherwise, and even in England a still unrepealed sentence of Magna Charta preserves to the wife and children "their reasonable parts of personal property," that is, one-third to the wife and the other third to the children. But the sweeping words of the Wills Act of 1837 (which Act, however, though it repeals numerous prior enactments in *pari materiâ*, does not mention Magna Charta) have been so long considered as dealing with the whole of the estate rather than with one-third of it, and so long an interval had elapsed between Magna Charta and the Wills Act, during which no "reasonable parts" had been claimed, that though the argument for the continued subsistence of the "reasonable parts" is perhaps just tenable, the authority is overwhelming that an Englishman or Irishman may leave both wife and children penniless and devise and bequeath all his property to a second wife, or to a stranger, or to a charitable institution, or even for the benefit of his horse or his dog. How is it that a law so iniquitous has remained so long unaltered? The reasons probably are, first, that except in rare cases both wife and children are sufficiently provided for by marriage settlements, or by the effect of the Married Women's Property Act; and, secondly, that where the absolute testamentary power is abused to their prejudice, the legatees who supplant them will frequently set their moral duty before their legal right by giving up the whole or part of their legacies. A notorious case, in which a religious society was constituted universal legatee a few years ago, is believed to have had this result. But it is not always that legatees have the will (as perhaps in the case of a second marriage) or even the power (as in the case of a strict trust) to be so complaisant; and a father has been known to

disinherit his son, for no reason whatever which could be called a reason, in favour of an institution the Governors of which desired to relinquish their fiduciary interest in favour of the son but were legally unable to do so.

Renewed Continuance of Temporary Laws.—Nearly seventy years ago a Linen Manufacturers Act imposed certain temporary restrictions upon the production and sale of Irish linen. Will it be believed, that this "Linen Manufacturers (Ireland) Act 1835," 5 & 6 Will. IV, c. 27, is still temporary only? It stands at the head of a long schedule to an annual Expiring Laws Continuance Act, which has been little altered, except by additions, for the last forty years. Here are to be found the Poor Rate Exemption Act 1840, the Corrupt Practices Act 1854, the Ballot Act 1872, the Employers' Liability Act 1880, the Parliamentary Elections Act 1868, which transfers the jurisdiction to the Parliamentary Election Petitions from Parliamentary Election Committees to the Judges of the Supreme Court, and a host of Acts of minor importance, the total number, with amending Acts, now amounting to more than eighty. Last year the absurdity of the system was pointedly brought before the House of Commons, and elicited from the Prime Minister the declaration "that our present system of continuing from year to year a large number of Statutes which no human being expects or desires to see repealed, is by no means a rational or reasonable mode of conducting public business."

Other Statutory Curiosities.—First and foremost among these may be mentioned the provision of 9 Edw. II, Stat. 1 (better known as *Articuli Cleri*), Revised Statutes, 2nd ed., at p. 66, by which an episcopal jurisdiction to enjoin *corporal* penances is expressly recognised and safeguarded. "If a prelate," still says Parliament, "enjoin a penance pecuniary . . . . . and it be demanded the King's prohibition shall hold place; but if prelates enjoin a penance

corporal, and they which be so punished will redeem . . . . by money, if money be demanded before a judge spiritual, the King's prohibition shall hold no place." Looking to *Ashford* v. *Thornton* (1810), 1 B. and Ald. 405; 19 R. R. 349; in which "wager of battle" was allowed before the quickly repealing 59 Geo. III, c. 56, in a case of murder, Lord Ellenborough, C.J., observing that "the general law of the land was in favour of the wager of battle, and it was the duty of the Court to pronounce the law as it was "whatever prejudices might exist against that mode of trial." May it not be said that corporal penance, so recognised by unrepealed statute, is still law, even to the extent of being an answer to an action for assault by corporal penance episcopally "enjoined"?

An Act of Henry the Eighth, 26 Hen. VIII, c. 41, by its incorporation of a Statute of Premunire, 16 Ric. II, c. 5, punishes with forfeiture of land and goods any suffragan bishop exceeding his jurisdiction.

Another Act of the same reign, 33 Hen. VIII, c 9, altogether prohibits labourers, fishermen and others playing bowls, tennis and other games "out of Christmas," and in Christmas also except in their master's houses and in their master's presence. The same Statute contemplates the licensing of common gaming houses with recognizances "in a certain sum to be approved of by the Lord Chancellor of England."

An Elizabethan Act, 5 Eliz., c. 9, still prescribes the sentence of the pillory "there to have both his ears nailed" on conviction of perjury in default of payment of a penalty, although the pillory has since been abolished.

A Sunday Observance Act of Charles the First, 1 Car. I, c. 1, prohibits all meetings of people out of their own parishes on Sunday for any sports or pastimes whatsoever, and the better known Act of Charles the Second (which, however, is restricted in its operation by a temporary Act

of 1871) obliges justices of the peace to consign convicted Sunday traders to the stocks in default of payment of a penalty.

The Caroline Act of Uniformity, 14 Car. II, c. 4, as read with the Elizabethan Act of Uniformity, still (as printed in the Revised Statutes) punishes a beneficed clergyman, on a third conviction by a jury for disobedience of it, not only by deprivation but by imprisonment for life; but the Clergy Discipline Act of 1840 has probably changed all this by implied repeal.

The Apostasy Act of William the Third, 9 Will. III, c. 32, disqualifies for any office civil or military any person denying the Holy Scriptures to be of divine authority, and extends (*see* per Best, J., in *R.* v. *Waddington*, 6 R. R., at p. 290) to any manifestation of such "dangerous opinion." A second conviction disqualifies the offender for being plaintiff, legatee or executor, and for holding any civil or military office for ever.

The Scottish Episcopalian Relief Act of 1794, 32 Geo. III, c. 63, disqualifies for voting at a Scots Parliamentary Election or sitting for a Scots seat in Parliament any person who may be present twice in one year at divine service in any Episcopal Church where all the Royal Family are not prayed for "in the prayers for the Royal Family contained in the liturgy of the Church of England."

The Unlawful Societies Act 1799, 39 Geo. III, c. 79, and the Seditious Meetings Act 1819, 57 Geo. III, c. 19 (the two corresponding Societies Acts recognised so recently as 1896 by the Consolidating Friendly Societies Act of that year), make unlawful all societies the members of which "take, subscribe, or assent to" any declaration not required by law or approved by two justices and afterwards confirmed by "the major part of the justices at quarter sessions." Any Member of such a society "shall and may" be punished by seven years' penal servitude or imprisonment up to two

years. Freemasons' Lodges, if magisterially certified, are specially exempted from these Acts by the Acts themselves, as also are registered Friendly Societies, under the Act of 1896: and the Seditious Meetings Act (but not the Unlawful Societies Act) also exempts Quakers' meetings and "any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated or discussed." Are not teetotallers and even "semi-teetotallers" within the scope of the Acts? The question is perhaps more academic than practical, inasmuch as any prosecution under either of the Acts may be stayed by the Attorney-General in England or the Lord Advocate in Scotland, who, however, have no power to interfere with a magisterial discretion to forfeit a public-house licence consequentially upon a meeting being held in a public-house.

The concluding sections of the Roman Catholic Relief Act 1829, 10 Geo. IV, c. 7, inflict perpetual banishment from the United Kingdom on all Roman Catholic monks (but not nuns) and Jesuits. The failure of the recent abortive attempt to enforce these enactments (which, though never enforced, were specially saved by sect. 4 of the Roman Catholic Charities Act 1832 (23 Will. IV, c. 116), did not proceed on the ground of obsoleteness (which is a doctrine of Scots but not of English Law), but upon the true construction of sect. 9 of the Indictable Offences Act 1848, 11 and 12 Vict., c. 42, under which a magistrate "may if he should think fit" issue a summons (which he had declined to issue) to cause a person charged with an indictable offence to appear before him in order to be committed for trial or discharged, according as the evidence may turn out to be sufficient or not.

Such are a few of the surviving absurdities and curiosities of English law. To judge from experience, it will take a very long time to get rid of all of them. But any of them

may at any time be translated into action, and a knowledge of such legal by-paths may at any time prove useful to practitioners.

J. M. LELY.

IV.—INDUSTRIAL TRUSTS.

THOSE who have recently visited America, or who are in the habit of reading American magazines and newspapers, have become aware of the existence of a strong and, at times, even passionate feeling, very widely spread, on the subject of what are known as the Trusts.

The name is an unfortunate one, because it is applied indiscriminately to things which are properly called Trusts, and to things which bear no resemblance to them. What is commonly understood when an industrial Trust is spoken of is a great commercial or trading business, without regard to the way in which the business is owned or managed.

My first object will be to make clear what the legal constitution of these so-called Trusts really is, and it will then be possible to consider what the grounds are for the existence of the feeling against them in America; whether there are any grounds for apprehension in this country; and what shape legislation could take to be effective, if it were found that legislation became desirable to regulate them.

Now I have said that the expression "Trusts" is applied indiscriminately to great commercial undertakings, without regard to the way in which they are owned or managed. Let us consider how they may be owned.

A great business may be owned by an individual for his own behoof; or it may be owned by a number of individuals jointly for their own behoof, subject only to this limitation in this country, that not more than twenty persons may

jointly own a business;[1] or it may be owned by one or more persons, who carry it on as trustees, for the benefit of others; or it may owned by a Corporation.

Now of these four ways in which a business may be owned, only the third, namely, the business owned by trustees for the benefit of other people, can properly be called a "Trust"; but as in America some of the best known great commercial undertakings were, at least in the first instance, owned in this way—and in particular the Sugar Trust and the Standard Oil Trust, the name became applied to all great businesses of a similar description, irrespective of the way in which they were owned.

Now, as a business develops, three difficulties stand in the way of the individual who has started it:—

(i) He wants capital to extend the business.

(ii) He wants to avoid staking the whole of his property on the success of the business; in other words, he wants to limit his liability.

(iii) He wants to prevent the business coming to an end at his death.

How can these objects be achieved?

To a limited extent capital can be obtained for the business by taking others into partnership, and, although a partnership is dissolved by the death of one of its members, the remaining partners can practically continue the business by forming a new partnership among themselves. But a partnership affords but small assistance to an increasing business, after it has reached a certain degree of expansion, for the number of partners is, as I have already pointed out, limited to twenty, and all the partners incur unlimited liability for the debts of the partnership: for what is known in France as a partnership "*en commandite*," that is a partnership in which some of the members can

[1] Sect. 4 of the Companies Act (1862).

limit their liability to the capital which they bring into the business, is unknown to the English law: although in the United States it has been introduced by legislation into some of the individual States of the Union.[1]

There remain a Trust and a Corporation.

A Trust is formed in this way: the managers of the business are made, legally, the complete owners of the business, and manage it as they think proper; they contract on behalf of the business and are liable to the full extent of their property for the debts of the business. But they are trustees of the property and profits of the business for any number of persons, who have contributed to its capital.

The advantages of this system are, that any number of persons may contribute to the capital required for the business; the persons who so contribute capital are not liable, beyond what they contribute, for the debts of the business;[2] and in the event of one of the trustees dying, another can be at once appointed, just as a fresh manager would be.

The disadvantages are that the trustees themselves are liable, to the full extent of their property, for the debts of the business, and that there is a lack of efficient control by the beneficiaries over the proceedings of the trustees. It was at one time thought that if the number of the beneficiaries under such a trust scheme exceeded twenty, it would be illegal, but this was a mistake,[3] and at the present day a Trust may be formed for the purpose of carrying on a business with any number of beneficiaries.

The important thing to observe, from a public point of view, is that such a Trust springs into existence without requiring any authorisation from the State, and therefore

[1] *Story on Partnership*, Sect. 78.
[2] See *Cox* v. *Hickman*, 8 H. L. C. 268.
[3] See *Smith* v. *Anderson*, 15 C. D. 247.

the peculiar control which a State can exercise over a Corporation, which it has itself created, does not exist in the case of a business owned by a Trust.

When a business is owned by a Corporation, any number of persons may contribute to the capital required for the purposes of the business; their liability is limited to the extent of their contributions; and the death of any contributor, however large his contribution, does not affect the continuation of the business by the Corporation. Thus, then, a great business may be owned either by a Trust or by a Corporation, but of these two the Corporation alone can be brought under the effective control of the State.

If, then, we desire to enforce the effective control of the State over great businesses, the first thing to do is to insure their being carried on by Corporations; and this can probably be most effectively done by providing that all those beneficially interested shall be fully liable for all debts contracted on behalf of any business.

I pass on now to consider what it is that has created the great outcry against Trusts in America.

Those who desire to investigate more in detail the present controversy about Trusts in the United States will find an interesting dissertation on the subject in a work recently published by G. P. Putnam's Sons.[1]

The general conclusion of that writer is, that there is, at any rate at present, no immediate necessity for exceptional legislation in the United States to regulate Trusts.

It is to be regretted that, in arriving at this conclusion, he should have thought it necessary to pray in aid the so-called social compact between rulers and those over whom they rule, by which the legislative powers of a State are supposed to be limited to legislating only in cases of extreme necessity.

[1] *Commercial Trusts.* By J. R. Dos Passos. New York and London: G. P. Putnam's Sons.

This theory, originated by certain French writers of the 18th century, is contrary to the established facts of history, and was thought to have. been finally exploded by the writings of Sir Henry Maine.

The real fetter on effective legislation in America does not arise from any theoretical social compact, but from the provisions of the Constitution of the United States.

It would be beyond the province of this paper to discuss the intricate questions which arise in consequence of the provisions of the Constitution of that country, which allocate the powers of legislation, partly to the Federal Government, and partly to the Governments of the several States. But it may be stated generally that, in consequence of those provisions, it is exceedingly doubtful whether either the Federal Government, or the Governments of the several States, have the power, even if they have the desire, to legislate effectually for the regulation of Trusts.

When I speak of the regulation of Trusts, I mean the guarding against certain evils which are likely to result from the concentration in the hands of the same owner of the whole or nearly the whole of any particular trade or business. These evils are of two kinds, economic and political.

The economic danger is that, if the whole of the production or supply of any commodity gets into the hands of a single owner, that single owner acquires what is called a monopoly of it: by which I mean, not that the law confers on that owner the exclusive right of producing or supplying that particular commodity, but that anyone who desires it can only purchase it from the owner in question, and must pay any price that the owner chooses to demand for it.

The result is that the consumer must pay the price asked or go without the commodity, and the workman, skilled in its production or manufacture, must accept such wage as the owner of the business is willing to pay for

his skill, or go into some other trade as an unskilled workman.

The political danger is the danger of corruption, political or judicial, arising from the great wealth and power of bodies such as the Trusts in the United States.

The reason why the question has come to the front so prominently in that country is, that the danger threatened from each of these causes has, to some extent, come to be real and pressing.

The system of heavy protective duties on imported articles has rendered it possible for the supply of certain commodities to come to be exclusively under the control of single Corporations or Trusts. The protective duties prevent effective competition from without; the whole sources of supply in the country are under the control of a single owner; hence the kind of monopoly of which I have spoken. It may, obviously, well be questioned whether it is in the interests of a State that the exclusive supply of commodities, such as oil or sugar, should be in the hands of a single owner.

Such is the economic danger in the United States. As regards the political danger, the writer, whose book I have already quoted, and whose conclusions are on the whole in favour of the Trusts, seems to regard it as common knowledge in America that what he calls "occult influences" are made use of by some of the great Trusts in order to secure privileges for themselves, and whether these privileges are or are not in particular cases in the interests of the public, the fact that there exist great and wealthy bodies, willing and able to corrupt Public Authorities, is a matter which may well give rise to alarm.

In 1890 an attempt was made to keep open competition in the United States by an Act which was designed to do away with monopolies. This was known as the Sherman Act, but it only struck at monopolies "of trade or com-

merce among the several States" of the United States or "with foreign nations," and not at the exclusive control of the supply of commodities by single undertakings. It was so limited because it was considered that the power of the Federal Congress under the Constitution extended no further, but the result has been that the Act has been practically inoperative.

In writing of the political dangers which may flow to a State, from the excessive wealth and power of a trading Corporation, there is one great Corporation whose power and wealth have made it a source, at least of anxiety, to the State in which its business is situated; I refer to the de Beers Diamond Mining Company. The great price of diamonds, due to the establishment of a practical monopoly in the hands of the Company, may perhaps be regarded with equanimity by legislators: but its power, and action, in the political affairs of Cape Colony should be a valuable object-lesson to this country.

I should travel outside the proper functions of an article in a law magazine, if I were to speculate as to the future development of commercial undertakings in this country, but it may be stated generally that the conditions are far less favourable to the realisation of the dangers economic or political, which may arise from overgrown Trusts, than are the conditions in the United States.

So long as this country retains its policy of Free Trade, no monopoly of the supply of any commodity could become serious unless it were world-wide. So long as the standard of political and judicial morality remains as high as it now is, no great evil need be feared in these directions.

But it is precisely because it is possible to discuss these questions, without the public mind having become inflamed about them, that the real fundamental principles, which lie at their root, have a chance of being recognised.

Now the first thing that has to be borne in mind when

thinking of Trusts in connection with this country is, that here Parliament is supreme, there is no limitation on its power of legislating, as there is in the United States on the legislative power of Congress. If legislation becomes necessary, and effective legislation can be devised, there is no constitutional difficulty in the way of altering the law.

I have already pointed out that, in order to be able to deal effectively with the dangers which may result from the concentration of over-great business undertakings in the hands of single owners, the law should insist upon their being carried on by Corporations. It would follow that such legislation as became necessary could be enacted as part of the ordinary Company law of the land.

A Corporation cannot spring into existence unless it is created by the State; the powers of Corporations, and the limitations of their powers, are alike the creation of the State.

The maxim, "In the eye of the law all men are equal," has no application to Corporations; we have long since become accustomed to companies being brought into existence with every sort of limitation of their powers, and every kind of regulation of their proceedings. Assuming, then, that any legislation which may be necessary should take the form of an amendment of the Companies Acts, how could we deal effectively with the dangers that may be apprehended from Trusts?

Let me first consider the economic danger, *i. e.*, the danger of there ceasing to be any effective competition in certain trades and businesses. Now it has to be remembered that this condition of things comes about by reason of no one in fact competing with the Trust which has secured the exclusive control of that trade or business; it is not easy to see, on the one hand, how anyone else can be forced to compete; or, on the other, how the Trust can be penalised because no one competes with it.

The utmost that it seems could be effectively done, with the object of keeping competition open, would be to invalidate all contracts which tended to check competition, thus restoring the old principle of the law, which was finally overthrown in *Nordenfelt* v. *Maxim Nordenfelt Co.*[1] But it seems to the writer that, if economic causes are working to cause trades or businesses to fall exclusively into the hands of single Corporations, the law will strive against these causes in vain; and that the proper function of the law is rather to regulate a monopoly, when established, than to try and hinder its establishment. The evil of endeavouring to fix prices or wages by law is, that competition, which is the surest way of producing the best results, is thereby hindered or prevented; if a Corporation has secured itself from competition, the objection to prices or wages being fixed by law no longer exists: and there should be express power of fixing the wages to be paid, and the prices to be taken, by any Corporation which, in the opinion of a competent tribunal, was carrying on business without competition from others. This power would have, of course, to be carefully exercised.

I pass to the political danger.

Of course the criminal law is to some extent an effective weapon against political, and particularly judicial, corruption, but the danger arising from the excessive power of a trading Corporation can only be effectively guarded against by limiting the power of these Corporations; this can probably be best done by taxation: special taxes might be imposed on either the capital or the profits of a Corporation, after they had attained certain dimensions, it being borne in mind that the object of these taxes would be the limitation of the wealth and power of individual corporations, and they would have to be imposed so as to achieve that result. I have purposely abstained from doing more than sketching

[1] ([1894], A. C. 535.)

an outline of the direction which legislation, to be effective, should take. Careful observation of the course of events in the United States during the next few years will teach us, if we read the lessons to be learnt aright, how to deal in detail with the dangers, if they arise here; but a clear understanding of the factors of the problem is essential, if we are to benefit by the experience which may be gained from the history of the Trusts in that country.

D. F. PENNANT.

V.—CRIMINAL STATISTICS, 1901.[1]

IN the article which appeared in this Magazine last year on the Criminal Statistics for 1900, disappointment was expressed that, contrary to former practice, the Introduction was of a meagre and unpretending character. This year no such complaint can be made. The Introduction, which is written by Mr. H. B. Simpson, Principal Clerk in the Criminal Department of the Home Office, deals, it is true, only with those figures which relate to matters coming specially within the scope of that Department, but, as it includes such subjects as the increase and decrease of serious and petty crime, the extension of the powers of Courts of Summary Jurisdiction, and the consequent diminution of cases tried at Assizes and Quarter Sessions, the amount and character of the work performed by the Justices, the reform of the circuit system, and the effect of penal servitude on other than habitual criminals, it is clear that the contents must be of great and varied interest.

At the beginning of the Introduction the writer remarks that the figures for 1901, as compared with those for 1900,

[1] *Judicial Statistics, England and Wales*, 1901. Part I.—Criminal Statistics. London: Eyre and Spottiswoode.

point to an unmistakable increase of crime. Several tests may be applied to this statement. For instance, the number of persons committed to prison must afford some indication of the amount of lawlessness, or at any rate law-breaking, in the country; and it appears from the Report of the Prison Commissioners for the year ending 31st March, 1902, that, including court-martial prisoners, there were 193 more prisoners sentenced to penal servitude, and 17,163 to imprisonment, than in the previous year. The daily average of prisoners detained in local prisons was 16,267, the highest average since 1885, while the average for the previous year was only 14,739. The Commissioners state that, with the co-operation of the police, they endeavoured, by local inquiry at places where the increase in the number of convictions during the year was most marked, to ascertain whether any special circumstances existed which would account for this rise in the prison population; but they arrive at the conclusion that the increase which was distributed generally throughout the country must be attributed to a number of circumstances, such as "the growth of large industrial centres, involving in many cases an extension of borough limits, and thus a greater activity and efficiency of police," and a multiplication of bye-laws, the transgression of which may result in imprisonment.

The average prison population, however, is clearly a very poor index to the amount of what may properly be termed crime. It may and must be affected by an increase in the number of persons committed for non-indictable offences, as, for example, paupers convicted of misbehaviour in the workhouse, of whom 4,654 were sent to prison in 1901 as against 3,312 in 1,900. Moreover, a greater readiness to go to prison rather than pay a fine, and a greater readiness on the part of the magistrates to commit without the option, would at once raise the numbers. The returns furnished by the police of the number of indictable offences reported to them

provide a better test of the amount of serious crime, and the numbers reported in each year from 1882 to 1901 are shown in the Statistics (Table C). Of course crime reported will only bear a very rough approximation to crime actually committed; but if we except figures relating to certain kinds of fraud, larceny, and assault, we shall probably be right in assuming that there is such an approximation. What, then, are the numbers? In 1900 the total number reported was 77,934; in 1901, 80,962, an increase of rather more than 3,000. This increase is made up as follows: In Class I—Offences against the Person—there was a rise of 174, occasioned chiefly by an increase under the heads of murder (including attempts), wounding, abandoning children, unnatural offences (including attempts). It is worthy of note that, whereas 161 murders were reported to the police, only 74 persons were tried for murder. In Class II—Offences against Property with Violence—there was a rise of nearly 1,000, housebreaking and shopbreaking showing an increase of 800. In Class III—Offences against Property without Violence—there was a rise of nearly 1,500, the increased numbers coming under the heads of Other Larcenies (chiefly simple and minor larcenies) and Frauds. Class IV—Malicious Injuries to Property—shows a slight fall; Class V—Forgery and Offences against the Currency—a slight rise, due to forgery: the number of coining offences continues to decrease, owing, no doubt, to the uniformly heavy sentences passed in such cases. In Class VI—Other offences not included in the above classes—there is a rise of 371, chiefly due to an increase of 321 under the head of Attempts to commit Suicide. These figures point clearly to an increase of crime in 1901, and corroborate the inference drawn from the rise in the prison population. Further confirmation may be found in what Mr. Simpson regards as the best available index to the amount of crime in the country, namely, the number of persons tried for indictable offences.

In 1901 the number tried was 55,453, as against 53,628 in 1900, and an annual average for 1897—1901 of 52,567 (Table BB); while the number convicted in 1901 was 45,039, as against 43,259 in 1900.

This increase of indictable crime is not considered by Mr. Simpson to be of any serious magnitude. For many years past the Statistics have pointed to a fairly steady decrease, and he has no doubt that the figures for 1901 show merely a casual fluctuation such as must be expected in statistics extending over a period of years. In support of this opinion he points out that, though the number of persons tried for indictable offences in 1901 was higher by nearly 3,000 than the average for the five years 1897–1901, and nearly 1,000 higher than the average for 1892–96, it is lower than the averages for 1887–91 and 1882–86, and lower than the figures for any year between 1879 and 1895, with the exception of the years 1890 and 1891. Unless, therefore, one is an "alarmist," one may accept the assumption that the circumstances which occasioned the increase in 1901 will be merely temporary; and whether that prove to be the case or not, it must be remembered that the decrease in the proportion of serious crime to population is maintained. For the five years 1882–86 the average number of offences tried on indictment per 100,000 of population was 53·13; for 1887–91, 43·87; for 1892-96, 39·25; for 1897–1901, 34·20, while the proportion in 1901 was 33·10 (Table D). There is also a decrease in the proportion of non-indictable offences, and it is only in respect of indictable offences tried summarily that an increase has taken place, the proportion in 1901 being 136·90 as against an average proportion of 130·69 for the five years 1897–1901. This increase, however, is not very serious, as the figures for the periods 1882–86, 1887–91, 1892–96 are respectively 166·98, 153·96, and 142·43.

One feature in the figures for 1901 is entirely satisfactory

—the continued decrease in the number of cases of larceny from the person. In 1898 there were 3,294 cases brought into Court, 3,007 in 1899, 2,990 in 1900, and 2,883 in 1901. When it is found that the average for the years 1893–97 was 3,578, these figures are very striking. The offence, as Mr. Simpson observes, is in some ways of especial interest, "as being probably more characteristic than any other of the 'professional' criminal: picking a pocket is one of the last forms of dishonesty which an ordinarily honest man will resort to in order to meet an emergency; but it presents special attractions for those whose intention it is to make a living by preying on the property of others." This statement is verified by the figures in Table IX showing the previous record of persons convicted on indictment. Of those convicted for picking pockets only 69 had no previous convictions, while 415 had been previously convicted. Of these latter 267 had not less than five previous convictions, and 87 of them had been previously sentenced to penal servitude.

Unfortunately, the figures for the other offences practised by the professional criminal do not tell the same tale. It is true that the number of "Habitual Criminals at Large" in 1901 (Table XXVI) was reported by the police to be 4,813 only as against 5,256 in 1900, 5,749 in 1899, and 5,814 in 1898; but during these four years the number of thieves and receivers of stolen goods remained more or less constant. If the figures for the offences of burglary, housebreaking, shopbreaking, possession of housebreaking tools, etc., are considered together, no improvement, is manifest. Thus, of the total number convicted for such offences there were, in 1899, 469 who had not been previously convicted, 1,012 who had, and 142 who had previously served a sentence of penal servitude. In 1900 there were 422 without, and 974 with, previous convictions, and 156 ex-convicts. In 1901 the numbers rose respectively to 444, 1,082, and 191. Thus, in the last few years at any rate, the amount of habitual crime

appears to have varied but little, although we ought not to leave altogether out of account the vastly improved means of identification supplied by the finger-print system.

We are aware that a distinction should be drawn between the "habitual" and the "professional" criminal. In speaking of the latter we should refer only to those whose fixed intention it is to live dishonestly, the men "with whom crime is a gamble, who attribute their capture to bad luck, and who cynically disclose their intention immediately on their release to try issue with the Goddess of Fortune, and systematically to prey upon society." The class of habitual criminals, on the other hand, will also include that large body of offenders who may live honestly for a time after their discharge from prison, but from moral or mental weakness cannot long abstain from crime. The statistics do not differentiate between these two classes, and perhaps, even if it were practicable, it is unnecessary that they should. The distinction is one of importance for the prison reformer rather than the statistician.

In strong contrast to the habitual criminal is the offender who is sent to penal servitude for some serious crime, but who afterwards reverts to a respectable mode of life. That such cases are by no means rare, may be fairly inferred from the number of "ticket-of-leave" men who are shown in Table LII to have been relieved of the obligation to report themselves to the police. As a rule, this remission is only granted in cases of convicts who are not known to have been previously convicted of any serious offence, and who, some months after their discharge, are reported by the police to be conducting themselves satisfactorily. There were 139 such cases in 1901, and of the remainder of those on whom the police reported during the year, only two had been re-convicted of crime. One convict who had been convicted of obtaining money by false pretences was in no regular employment, and his mode of life was such that

it was deemed best to keep him under police supervision; he was afterwards convicted of robbing his employer. In three other cases the reports were not so satisfactory as to justify interference with the ordinary conditions of the licence, though at least one of these men was known to have been earning an honest living; and in four cases the police were unable to say anything, as the licence-holders had failed to report themselves and had disappeared. These figures certainly rebut any general "assumption that penal servitude has the effect of crushing the moral responsibility of persons subjected to it and barring a return to paths of honesty;" and probably, if the truth were known, it would be found that far more characters have suffered from the moral effects of short terms of imprisonment. Of those convicts who retrieve their characters after discharge, a large number, we may surmise, are men who have committed crimes of violence under the excitement of drink or passion; the remainder is probably made up of men who have been guilty of such isolated offences as bigamy. If a Table could be prepared supplying this information, the results would be of considerable interest, especially if a statement were subjoined showing the number of convicts re-convicted or re-committed for trial within twelve months of their release, the offences with which they were charged, and the offences for which they had previously been sent to penal servitude.

Before leaving the Tables dealing with crime tried on indictment, there are two points worthy of comment in connection with Tables II and IV, which give the length of sentences passed at Assizes and Quarter Sessions. The first is that apparently no attempt is made to inflict punishments on a finely graduated scale. In 1901 sixteen convicts were sentenced to 15 years' penal servitude, and twenty-two to 10 years, but only two were sentenced to 14 years, and eight to 12 years, while none (it would seem) received

sentences of 11 and 13. Again, one was sentenced to 9 years, and eight to 8 years, but no less than fifty-one to 7 years; and while two hundred and forty-five received sentences of 5 years, only eleven received sentences of 6 years. It is not perhaps to be expected that great exactness should be shown in making the punishment fit the crime, but the Courts seem hardly to avail themselves as much as they might of their power to discriminate. One wonders also whether, in the case of a gang, as much as possible is done by varying the length of sentences to prevent the members of it rejoining one another immediately after discharge. The second point is that, so far as they afford any light on the subject, the figures tend to confirm the belief that, if in punishing any particular form of crime the Courts do not distinguish too nicely between the guilt of different offenders, neither do they recognise such a thing as a standard punishment. This is especially noticeable in the case of offenders against the person. For example, there were the following sentences passed at the Assizes in 1901 for rape:—Two sentences of 15 years' penal servitude, two of 12, two of 10, one of 8, four of 7, two of 6, six of 5, one of 3, and thirty-one sentences of terms of imprisonment of varying length.

Coming now to the Tables relating to proceedings in Courts of Summary Jurisdiction, we find that, as already indicated, the number of persons tried summarily for indictable offences has risen considerably. They numbered 41,070 in 1898, and after a slight drop in 1899, rose to 43,479 in 1900, and 44,656 in 1901. Some of the differences between the figures of 1898 and 1901 are worth mentioning. There was an increase in 1901 of 1,394 cases of simple larceny and offences punishable as such, and an increase of 604 cases of larceny by a servant. The justices also disposed of 1,072 cases of obtaining by false pretences, an offence not summarily triable, in the case of adults, previous to the Summary

Jurisdiction Act 1899, and 175 cases of habitual drunkenness, an offence created by the Inebriates Act, 1898. The figures show that the provision of the Act of 1899, allowing charges of obtaining money or goods by false pretences to be tried by the defendant's consent without a jury, has had the effect not only of transferring cases from Assizes and Quarter Sessions to Police Courts, but also, by facilitating prosecutions, of adding largely to the total number of indictable offences brought into Court. Thus, while the number of cases of false pretences tried at Assizes and Quarter Sessions fell from 890 in 1898 to 394 in 1900, and 452 in 1901, the number of persons tried summarily for the offence rose from 3 (who must have been children under the age of 12) in 1898 to 1,041 in 1900, and 1,072 in 1901.

The number of persons charged with non-indictable offences is also rising. The figures for 1901 do not, indeed, reach the figures for 1898 and 1899, but in these two years, while the Muzzling Order was in force, "Offences in relation to Dogs" numbered 43,210 and 21,734 respectively, but only 7,041 in 1901. There was also in 1899 the exceptionally high number of 214,298 prosecutions for drunkenness. Going further back, however, we observe a steady rise, especially under the following heads: Adulteration, where the number of persons charged has increased from 1,436 in 1886 to 3,817 in 1901; Offences against the Highway Acts, where the increase in the same period is 17,753 to 42,610; Drunkenness, where the number of persons charged fluctuated greatly from year to year during the period 1882–92, and since then has risen with tolerable regularity from 168,927 to 210,342; Police Regulations, where there has been a very steady rise from 62,322 in 1886 to 132,997 in 1901; Sunday Trading, where the increase is from 1,597 in 1882 to 4,950 in 1900, while in 1901 there was a drop to 4,877. Since 1886 the total increase of persons charged with non-indictable offences before Courts of Summary Jurisdiction has been 164, 970.

A satisfactory decrease, however, has to be noted in the number of prosecutions for assaults (including common and aggravated assaults, and assaults on police). This decrease has been continuous for the last twenty-five years, and is very clearly marked in the figures for the last four years, which show 72,387 prosecutions in 1898, 71,240 in 1899, 65,579 in 1900, and 64,115 in 1901. In view of the increase in the number of prosecutions for Drunkenness, it might be inferred that the number of assaults is not affected by the amount of drunkenness, but it is more than probable that the increased number of prosecutions is due, not to an increase of the offence, but to a stronger public opinion influencing the action of the police.

Attention is called in the Introduction to the fact that of the 638,508 persons convicted in 1901 at Police Courts, only 70,740 were sentenced to imprisonment in the first instance, while 548,182 were fined, and the per-centage of persons sentenced to pay fines who were received in prison in default, is very small. In 1901 the number so received was 86,536 (of whom probably about 12,000 paid their fine in whole or in part after reception). From 1893, when it was 18·91, the per-centage decreased steadily to 14·73 in 1900, but there was a rise to 15·79 in 1901. The increase in the total number of cases dealt with in the Police Courts has been mainly "in respect of offences which may easily be committed by persons in a respectable position who would feel ashamed to go to prison and can afford to pay to keep out of it"; and consequently the decrease in the per-centage between 1893 and 1900 is quite intelligible. The rise in 1901 is not so easily explained, but it may be attributable, as Mr. Simpson suggests, to the effect of the Rules made under the Prison Act 1898. The amelioration of prison discipline, he thinks, has led to a larger proportion of persons undergoing imprisonment in default of a pecuniary penalty. We think it also probable that the low per-

centages in 1899 and 1900, namely, 14·89 and 14·73, were due in part to the great prosperity of these years. Wages being high and work plentiful, fines for drunkenness were more readily paid.

In connection with the records of Summary Proceedings, Mr. Simpson comments on the really remarkable fact, that "this vast body of work—781,622 criminal charges finally disposed of, 10,851 cases investigated and committed for trial, and 6,623 cases dismissed under the Indictable Offences Act (Table XIX), as well as the large number of quasi-criminal proceedings shown in Table XIV, and the great bulk of magisterial business with which these statistics do not deal at all—such as the business connected with Licensing, Poor Law, Lunacy, and a host of other matters—is for the most part done by voluntary labour, at a cost to the public in respect of staff and office expenses, which is nearly or altogether met by the revenue accruing to local funds from the fees charged and the fines recovered." Very little use has recently been made of the general powers conferred by Acts passed in the first half of the last reign for establishing Stipendiary Magistracies in various parts of the country; and the result has been that the great increase of work entrusted to the unpaid Justices of the Peace has been met "without any material alteration of the machinery which was sufficient for our wants half a century ago." Moreover, that the public is generally satisfied with the system may be inferred from two considerations: firstly, that there were in 1901 only 174 appeals from summary convictions, the conviction being quashed in 60 cases only (Table XV); and secondly, that it seems fairly certain that defendants, in cases where trial by jury can be claimed, rarely avail themselves of the right if the Justices consent to dispose of the charge. Certainly, the number of criminal cases of more than a trivial nature which are tried by the Justices, is a strange commentary on the popular idea that the one outstanding fact in our judicial (criminal) system is the trial by jury.

In Articles in this Magazine on the Statistics of previous years, reference has several times been made to Table XXXIX, which gives the number of unconvicted prisoners committed to each Court for trial, the number released on bail after committal, and the terms of detention in prison before trial. On each occasion stress has been laid on the length of time for which an unconvicted prisoner may be kept in prison awaiting trial, and on the serious hardships which such detention must often entail. The continuance of this scandal—the expression is not too strong—is attested by the figures for 1901. Out of a total of 8,428 there were no less than 1,154 persons who were kept in prison awaiting trial for eight weeks or more, 429 of these being for trial at Assizes; 355 of these were in prison for twelve weeks or more, 207 of them being for trial at Assizes; 72 were kept for more than sixteen weeks, of whom 66 were waiting for the Assizes. Of the 1,154 imprisoned for eight weeks or more, 129 were ultimately acquitted; of the 355 imprisoned for twelve weeks or more, 48 were acquitted; of the 72 imprisoned for sixteen weeks, 12 were acquitted. Granted that some of those acquitted were guilty and escaped merely by luck, and granted that some found life in prison as comfortable as the life they had to lead outside, still a number must have undergone unmerited embarrassment and suffering.

Mr. Simpson points out three directions in which a remedy may be sought—by giving Courts of Summary Jurisdiction more extensive powers with regard to indictable crime; by the more frequent exercise by magistrates of the power conferred on them by the Bail Act 1898, of allowing defendants committed for trial to go at large on their own recognizance without requiring further security; and by such a reform of the judicial system, and especially of the circuit system, as will ensure more frequent trials. The first suggestion may perhaps be put aside. Of offences

which at present can only be tried on indictment, there are not many which it would be expedient to make punishable on summary conviction, and if offences such as bigamy and attempted suicide were made summarily triable, the cases which Police Courts would feel themselves competent to deal with would probably be few.

The second remedy is discarded also by Mr. Simpson on the ground that the probability is that magistrates do already avail themselves, whenever possible, of the powers given them under the Act of 1898. The grounds for his belief are certainly strong. "Some thousands of petitions," he observes, "are received every year from prisoners and their friends, and in a large number of them the length of the detention in prison before trial is urged as a plea for reduction of sentence; but neither in these nor in the large mass of miscellaneous communications addressed to the Home Office, in connection with criminal justice, would it be easy to find any complaints of the unreasonable conduct of magistrates in this respect. It would, I believe, be impossible to find a single case in which such a complaint has been substantiated." There are, of course, many cases in which it is impossible to risk a failure of justice by allowing a man to go at large simply on his own recognizance, and at present there appears to be no positive evidence to suggest that justices are reluctant to dispense with sureties or fix bail at an excessive amount.

We come, then, to the third remedy which, according to Mr. Simpson, would be the most effective—a reform of the circuit system ensuring more frequent trials. At present, with the exception of London and the adjacent counties, Courts of Oyer and Terminer and Gaol Delivery are not held more than four times a year in any county, while they are held at least twice in each, however small the population. Yet in no less than twenty-one counties out of fifty-three, as appears from Table VII, the number of cases for trial at

Assizes during the whole of 1901 did not exceed twenty, while in fourteen counties there were less than a dozen. What seems wanted, then, is that certain counties should be permanently grouped together for Assizes, and that Assizes should be held more frequently. A precedent, if any be required, is afforded by the Central Criminal Court.

The last two Tables of the Statistics (Tables LII and LIII) deserve special notice, in particular Table LII, which is headed "Habitual Drunkards," and which should be read in connection with the Report for 1901 of the Inspector under the Inebriates Acts. Section 1 of the Inebriates Act 1898, enables a Court of Assize or Quarter Sessions to commit to an inebriate reformatory, for a period not exceeding three years, a habitual drunkard who is convicted on indictment of an offence punishable with imprisonment or penal servitude, provided that the Court "is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributory cause of the offence." Section 2 enables the Courts to make a similar order in the case of a habitual drunkard who commits any of the offences mentioned in the First Schedule of the Act (*e.g.*, drunk in a public place, drunk and disorderly, etc.), and who, within the twelve months preceding the date of the commission of the offence, has been convicted summarily at least three times of any of the offences so mentioned; and cases under this section may be disposed of on summary conviction. The figures show that much more advantage is now being taken of these provisions. Under Section 1 there were twenty-six committals to Inebriate Reformatories in 1901, as against seventeen in 1900, and seven in 1899. Under Section 2 there were one hundred and seventy-eight committals in 1901, as against one hundred and twenty-seven in 1900, and eighty-one in 1899, all these cases except twenty-one being dealt with summarily. No

doubt as the Act becomes better known, and more accommodation at Certified Reformatories can be obtained, a still greater increase may be expected. At present a number of Courts make little or no use of their powers. Since the Act came into operation, fifty cases in all have been committed under Section 1, but exactly half of these were committed from the North and South London Sessions. Again, under Section 2, there were sixteen committals in 1901 at Newcastle, but only one at Sunderland, and none at South Shields or Gateshead. Yet it can hardly be supposed that these latter places enjoy an immunity from the habitual drunkard.

Other points of interest arise in connection with these figures. One is the offences of which, in addition to habitual drunkenness, those committed under Section 1 of the Act were convicted. Of twenty-six committed in 1901 twenty-one were convicted of cruelty to children; three were convicted of attempted suicide; one of malicious damage; and one of assaulting a police constable. And this brings us to a second point. The whole twenty-six were women. This cannot be regarded as mere coincidence, since during the period 1899—1901 no less than 385 females have been committed and only 51 males. Want of accommodation for male inebriates may partly explain these numbers, but other statistics point in the same direction. The Inspector's Report, for example, contains a return from the Metropolitan Police District of males and females convicted four or more times of drunkenness during the year ending 31st October 1901, and this return shows 451 females to 174 males. On the other hand, of the 127,011 persons who were convicted in 1901 of being drunk and disorderly, 91,970 were males and only 35,041 females. The presumption would seem to be that women fall more easy victims than men to habitual drunkenness, but the data are not yet sufficient to warrant any definite conclusion.

Table LIII deals with the exercise of the Prerogative of Mercy. There were no Free Pardons in 1901, but by Conditional Pardons twelve capital sentences were commuted to penal servitude for life. In only one case of penal servitude was remission of sentence granted, but 83 convicts were released on licence earlier than in the ordinary course. Remission was granted to 182 prisoners undergoing terms of imprisonment in local prisons, and fines were remitted in six cases. Out of a total of 420 cases in which the Prerogative was exercised, the Royal clemency was extended in 394 on medical grounds or in simple mitigation of sentence. Only in 8 cases was it shown on grounds affecting the original conviction, *i. e.*, in cases where fresh evidence tended to establish the prisoner's innocence, or to alter the view taken as to the nature or gravity of the offence.

VI.—THE MARRIAGE LAWS OF SCOTLAND.

THE earliest authentic monuments of the law of Scotland correspond to a great extent with those of Norman England; they give us little or no information about the law of marriage, and of the law of early Celtic Scotland we know little that is reliable. In the Scandinavian settlements the same customs were observed, probably, as in Scandinavia itself. All that preceded the physical union was considered as a *faestning*—a betrothal; *faester* (in Dutch *vast*, in German *fest*) means firm, agreed upon. "*La seule formalité*," writes Professor Beauchet, "*dont fasse mention la loi de Vestrogothie, est la poignée de main, en signe de conclusion du contrat.*"[1] "The custom termed hand-fasting," says Mr. Skene, "consisted in a species of a contract between two

[1] L. Beauchet, *Loi de Vestrogothie*, p. 1903, note. See also by the same author an article on the same subject, *Nouvelle Revue historique de droit français*, 1885, p. 68.

chiefs, that the heir of the one should live with the daughter of the other as her husband for twelve months and a day. If in that time the lady became a mother, or proved to be with child, the marriage became good in law; but should there not have occurred any appearance of issue, the contract was considered at an end, and each party was at liberty to marry or hand-fast with any other."[1]

Now-a-days Scotland, in many respects, stands quite alone in Europe, as to the state of its marriage laws. Curious to say, the constitution of the matrimonial tie is left on the basis of the old Canon law, unregulated by secular legislation. One instance: boys of 14 and girls of 12 may marry without the consent of parents or guardians. Other nations, however, modified marriage in different ways, and required the interposition either of Church or of State, or of both, to validate the legal contract.

Another instance: As in ancient Canon law[2] so in Scotch law, the singular facility which their law presents of constituting marriage is counterbalanced by extremely rigid rules as regards the proof of it. According to Scottish judges, testimony by the parties themselves is insufficient to prove a marriage by declaration *de præsenti*, though they may, in some cases, be the only persons really acquainted with the facts. It was said, before the Royal Commissioners in 1868, that "the Scotch are too wise a people to allow such a mode of proof."[3] Yet the same parties, if they should happen to remove their residence from Scotland to England or Ireland, would there be permitted to prove themselves married by that very kind of evidence from the benefit of which they are excluded in Scotland; so that the consequences of this facility of proof outside of the latter country are very extensive.

[1] W. F. Skene's *Highlanders of Scotland*, Vol. I, p. 166.
[2] See A. Esmein, *Le Mariage en droit canonique*, I, p. 189.
[3] *Report on Marriage Laws*, 1868, p. 188.

During the middle of the eighteenth century, there occurred a number of cases in the courts of Scotland which, in a remarkable degree, exhibited the mischievous consequences of irregular marriages from a moral point of view. There was *Forbes* v. *The Countess of Strathmore*, in 1750, in which the *man* was the pursuer, the footman to the countess claiming to be her husband. Also *Pennycook* v. *Grinton* and *Graite*. John Grinton was, during his life, claimed for a husband by two women. In *Kennedy* v. *Campbell*, after the death of the man, two women came forward, each claiming to be his widow.

On the same day—31st January, 1753—that it affirmed the judgment of the Court of Session in the last above-mentioned case, the House of Lords made the following order: "Ordered that the Judges do prepare and bring in a Bill for the better preventing of clandestine marriages." (28 *Lords Journals*, p. 14.)

The order is in terms comprehensive enough to include Scotland as well as England. But the English judges, to whom the reference was made by the House, confined the Bill to England. The draft of the Bill was shortly afterwards presented to the House by the Lord Chief Justice of the King's Bench, and during the same Session of Parliament it passed into a law, called after the Lord Chancellor of the time, Lord Hardwicke's Act (26 Geo. II, c. 33).

Had an imperial measure, applicable to the United Kingdom, been brought in at the same time, it is not likely that it would have met with more opposition in Scotland than in England, but the opportunity was lost by confining the Bill to England, and the two countries were placed in a wider state of contrast.

However, "there was a difficulty arising out of the Act of Union, in applying the Marriage Act to Scotland, for the state of religion is not to be touched, it is to remain exactly as it was."[1]

[1] *Middleton* v. *Janverin*, *per* Sir William Wynne, 2 Hagg. Cons. 448.

In 1849, an attempt was made by Lord Advocate Rutherford to introduce into the House of Commons a Bill, proposing that in future no marriage in Scotland should be valid except celebrated religiously by a clergyman or civilly before a registrar, certain notices to secure publicity in each case being given beforehand. The Bill was referred to a Select Committee of the House; it was ultimately dropped.

But, as Dr. Henry Goudy wisely suggests, it would be of little use to alter the law of Scotland unless a uniform system can be obtained for the whole kingdom. "It is unsatisfactory that a British citizen, whose duties or avocations require him to move about different parts of the Empire, shifting his domicile from time to time, should find himself subjected to diverse matrimonial systems, with consequent uncertainty as to his legal rights in the most important of all human relations."[1]

The Hon. Mr. Justice Phillimore, in a learned paper, went even further. "It may be desirable," he said in 1901 at Glasgow, "that civilised nations should arrive at one "uniform code of laws as to marriage; but it is almost "certain this will never be."[2]

The community of law *(la communauté de droit)*, is the ideal of our science, and we must acknowledge that, for marriage, it is absolutely necessary to have such a community.[3]

I.—*Leading Principles.*

I.—Consent makes marriage. "No form or ceremony, civil or religious, no notice before or publication after, no consummation or cohabitation, no writing, no witnesses even, are essential to this most important contract."[4]

[1] *Report of the Twentieth Conference of the International Law Association, held at Glasgow*, 1901, p. 239.

[2] *International Law of Marriage*, p. 228.

[3] E. Stocquart, *Studies in Private International Law*, p. iv, Preface.

[4] *Leslie* v. *Leslie*, *per* Lord Deas (*Court of Session Rep.*, 2nd Series XXII, p. 993).

The fundamental principle is this very simple one: *consensus facit matrimonium.* All that it requires in order to sustain the validity of the marriage is evidence of the deliberate interchange of matrimonial consent, *inter legitimas personas.* No matter how, when, or where contracted; whether regularly or irregularly, with a ceremony or without it; so long as *constat de consensu*, the marriage is a good and valid one to all intents and purposes.[1]

Marriage by a registrar is unknown in Scotland.[2]

II.—The age of consent is fourteen for men, twelve for females. At these ages, the capacity for procreation is presumed, and this capacity is considered to be a reason for entitling the parties to marry.

But the presumption of physical incapacity below these ages is *juris et de jure*, and in such a case inquiry will not be made into the fact of capacity; the marriage will be void, unless it should have been adopted after the age of puberty, as by continued cohabitation.[3]

No consent of parents or guardians is required.

III.—Marriage itself may be contracted either regularly in the face of the Church (*in facie ecclesiæ*), which is the common mode of contracting it, and is called a *regular* marriage; or it may be contracted clandestinely and inorderly, the entering into which is a punishable offence—called *clandestine* marriage; and it may also be contracted by mere consent, when is no party celebrator, not being punishable—called *irregular* marriage.

[1] J. Muirhead, *Notes on the Marriage Laws of England, Scotland and Ireland, with suggestions for their amendment and assimilation*, p. 55.

[2] Compare Glasson, *Le mariage civil et le divorce*, p. 317 (2e édit.); Baron Guillaume, *Le mariage en droit international privé*, p. 421.

[3] *Johnston* v. *Ferrier*, 1770, M. 8931.

II.—*Regular Marriage.*

A regular marriage is one celebrated by a minister before at least two witnesses, after due proclamation of banns,[1] or publication of a notice by the Registrar.[2]

(A) *Historical outline.*—The marriage law of Scotland is based upon the Canon law, which was administered in the Ecclesiastical Courts before the Reformation.[3]

During the early ages of Christianity, and even after the conversion of the Roman Empire and its consequent establishment of the Catholic religion as the religion of the State, matrimony was deemed a holy estate, and the members of the Church were induced to take the matrimonial vow at the altar, but we never find that the Church attempted to impeach the validity of those marriages which were contracted under a merely civil form. On the contrary, the marriage of a churchman with a heathen or heretic was censured, but, nevertheless, considered perfectly valid.

No religious rite was ever necessary as a *sine qua non* to the validity of a marriage, until the decree of the Council of Trent (11th November, 1563).[4] But a sacerdotal blessing

[1] *Scruton* v. *Gray*, 1 December, 1792 (*Hailes' Decisions*, p. 499); 4 & 5 Will. iv, c. 28.

[2] *Marriage Notice Act* (41 & 42 *Vict.* c. 43).

[3] Green's *Encyclopædia of the Law of Scotland*, v° *Marriage*, p. 245 (by Frederick P. Walton).

[4] The doctrine and discipline of the Catholic Church in respect to the validity of Catholic marriages are set out in clear terms by the aforesaid Council, sess. xxiv, cap. 1, *De Reform. Matrim.*, where the Council declares null and void the marriage of any persons who shall attempt to contract marriage otherwise than *in presence* of the parish priest (*proprius parochus*), or a priest having his or the ordinary's licence. *Ubi parochus, viro et muliere interrogatis, et eorum mutuo consensu intellecto, vel dicat:* Ego vos in matrimonium conjugo, in nomine Patris et filii et Spiritus Sancti—*vel aliis utatur verbis juxta receptum uniuscujusque provinciæ ritum.* It must be borne in mind that nuptial blessing was no *essential* to marriage, but the deliberate interchange of matrimonial consent ought to be given in the presence of the parish priest and two or three witnesses. (For details, see our *Aperçu de l'évolution juridique du mariage*, *Belgique Judiciaire*, 1903, p. 196.) Conf. *Scruton* v. *Gray*, 1 December, 1772, where Lord Hailes wrongly states that the Council of Trent "required the sacerdotal benediction, as necessary to the essence of matrimony."

was frequent and often encouraged. A book published in London in 1543, *The Christian State of Matrimony*, illustrates this as follows: "Every man lykewyse must esteme the parson to whom he is hand-fasted, none otherwyse than his owne spouse, though as yet it be not done in the churche nor in the streate. After the hand-fastynge and makyng of the contracte, the church-going and weddyng should not be differed to longe" (p. 43).

Christianity seems to have been introduced into Scotland during the fourth century, perhaps by the landing of S. Regulus and his party in A.D. 307, in that little bay which bears the name of the great apostle St. Andrew, whose bones S. Regulus is said to have brought over with him.

In 306, S. Ninian began his mission to the Southern Picts, from which sprang the See of Galloway.

A church, constituted with bishops, priests and deacons, became the national branch of one Catholic and Apostolic Church. For over a thousand years, that national Apostolic Church was the one undivided christian society in Scotland, conspicuous among the Churches of Christendom for her long line of saintly names among clergy and laity: S. Ninian, S. Kentigern, S. Columba, S. Margaret, S. David; for the number and stately beauty of her abbeys and churches; and for her princely endowments, the gifts of her faithful and devoted people.

The regulation requiring celebration of a marriage in a church was first promulgated by a Provincial Council which met at Edinburgh in 1242. This rule was continued by the Church at the Reformation in 1560.

Whether the Canon law of Rome, as such, was binding on the Scottish Courts in the sense in which they are now bound by a British statute, or if it was only the statutes of the Scotch Provincial Councils which bound them, is a question of difficulty, says Mr. F. Walton.[1]

[1] Green's *Encyclopædia*, v° *Marriage*, p. 245.

Fraser thinks it was only the Canon law embodied in the statutes of the Scotch Provincial Councils which was binding, while the rest of the Canon law was referred to, but a particular rule might be rejected by the Court.[1]

In England a similar view is supported by the opinions in *Queen* v. *Millis*.[2]

According to Professor Maitland, the Ecclesiastical Courts in England, at any rate until the eve of the Reformation, never claimed such a degree of independence, but treated the Canon law made by the Popes as absolutely binding.[3]

It is unlikely that the Church Courts in Scotland were more independent than those of England.

The loss of the record of the Ecclesiastical Courts prior to the Reformation, and the separate jurisdiction of the commissaries since that time, has left some of the more speculative matters in considerable doubt.[4] Scotland has no Bracton, no Britton, no Fleta, to fill up the blank places in the history of her laws. There, even more than in England, the Reformation was a period of strong religious excitement, of violent party conflict. Councils of Scottish bishops and clergy were held in 1549 and again in 1559, and Canons of Reformation were enacted. The Parliament of Three Estates (bishops, the greater and lesser barons) which met at Edinburgh in August 1560, passed measures so extravagant as to be well calculated to destroy the ancient order and teaching of the Church of their fathers.

According to the late Professor Muirhead, there seems to be nothing in the history of the marriage law of Scotland to suggest the idea that up to the time of the Reformation, at all events, it differed much from that of England. In both, marriage might be validly constituted either by regular

[1] Fraser, *On Husband and Wife*, I, 28.

[2] [1884], 10 Cl. & Fin. 534.

[3] *English Historical Review*, 1896, pp. 446, 641.

[4] Evidence of the Right Hon. James Moncrieff (*Report of the Royal Commission on the Laws of Marriage*, 1868, p. 59).

celebration after publication of banns, or by clandestine celebration, or by *sponsalia*. Nor did the law as thus settled undergo any change on the overthrow of Roman Catholicism.[1] The law, as administered prior to the Reformation, was only abrogated, so far as it was contrary to the Protestant religion (Act 1567, c. 31).

Subject to this, to such modifications as it has undergone from time to time by the application of the rules of evidence established in Scotland, and the course of judicial decision, the ancient Canon law continues to rule the legal constitution of marriage.[2]

In 1570 the General Assembly of the Church of Scotland ordained "that all marriages be made solemnlie, in the face "of the congregation, according to the ordour publicklie "establischit; and als inhibites all ministers and exhorters, "that none of them solemnize marriages of any persons of "uther congregations not their owin, without sufficient "testimonials from their ministers, or else license askit and "given be the contracters."

In 1595, the Assembly passed an Act nullifying "marriages made be excommunicat priests, or uthers that has "served in the Kirk, and are deponit from their office, or "by privat persons," and appointed certains members "to "travell with the Commissars of Edinburgh that they "decide according to the said conclusions."

After the restoration of the Presbyterian Church government, upon the overthrow of the Episcopacy, the Commissioners of the Kirk petitioned Parliament, in the year 1639, "to appoint some good course, whereby marriages maid out "of the Kingdome, or by depryved ministers or seminarie "priests, and marriages maid without the consent of parentis "by those who are *sub tutela parentum*, may be restrainit."

In consequence of such petition, was passed, in 1641, an

[1] J. Muirhead, *op. cit.*, p. 41.
[2] *Report on Marriage Laws*, 1868, p. xvi; *Scruton* v. *Gray*.

Act (2 Charles I) which, to a certain extent, attempted to mitigate the evil, namely regarding marriages by Scottish people in England or Ireland. But that Act does not seem to have been followed out in practice, and it was afterwards rescinded.[1]

It was re-enacted by the Act of 1661, with considerable additions; it is entitled "An Act against clandestine and "unlawfull marriages," and runs thus:—"Our Soverane "Lord and the Estates of this present Parliament, con- "sidering how necessarie it is that no marriage be celebrate "but according to the lawdable order and constitution of "this Kirk, and by such persons as are by the authority of "this Kirk warranted to celebrate the same. . . . . . "Thairfor his Majestie, with advice of his said Estates, "statutes and ordaines that whatsoever persone or persones "shall hereafter marie or procure themselves to be married "in a clandestine or inorderly way, or by Jesuits, priests, or "any others not authorized by this Kirk, or to satisfie their "promeise of mariage formerlie made to others, *or to decline* "*the concurrence and consent of their parents or others haveing* "*interest*, or out of some other unlawful pretext, doe procure "themselffs to be maried either in a clandestine way, con- "trary to the established order of the Kirk, or by Jesuits, "priests, deposed or suspended ministers, or any others not "authorized by this Kirk: Thaifor his Maiestie with advice "of his saids Estates, statutes and ordaines that *whatsoever* "*persone or persones shall heirafter marie* or procure them- "selffs to be maried *in a clandestine or inorderly way*, or by "Jesuits, priests, or any others not authorised by this Kirk, "that they shall be imprissoned for three moneths, and "beside their said imprissonment shall pay, each nobleman "one thousand pounds Scots, each baron and landed gentle- "man, one thousand marks, each gentleman and burges "fyve hundreth punds, each other persons one hundreth

[1] *Report on Marriage Laws*, 1863, p. 138.

"marks: and that they shall remaine in prisson ay and "whill they make payment of these respective penalties "above mentioned which are heirby ordained to be applyed "to pious uses within the severall paroches where the saids "persones dwells; And the celebrator of such mariages be "banished the Kingdome never to return therein under the "paine of death. Lykas, his Majestie," etc.

These restrictions were considered by the people of Scotland as unjust encroachments on freedom, and they defied them by marrying irregularly. Those who know the Scotch, may surmise the only effect of the restrictions: multiplication of irregular marriages. As an evil, they encouraged concubinage and illegitimacy. Even members of the Established Church, so the parochial registers prove, protested against these unjust and oppressive laws; they objected to the freedom of the people being interfered with by a dominant clergy, who used their influence with the State to get an Act passed favourable to themselves, but oppressive to all others.[1]

When these restrictions were removed, the people returned to the regular form of marriage, the law was obeyed, and morality was thereby encouraged. It may be safely assumed that, during the whole of the eighteenth century, a third of all marriages in Scotland were contracted irregularly.[2]

By the Act 10 Anne, c. 7, Episcopal clergymen, who had taken the oaths to the Government, were allowed to perform the marriage ceremony. This privilege was afterwards extended, by the Act 4 & 5 Will. IV, c. 28, to all persons in holy orders of whatever communion, but only on condition that the banns should be previously proclaimed in parish churches of both parties; and if the parties were Episcopalians, also in the chapel to which they belonged.

[1] *Report on Marriage Laws*, 1868, p. 4, Appendix.
[2] *Rep.*, p. 3, Appendix.

The practice of marrying in church continued to the beginning of the eighteenth century, when, for a long time, a regular Presbyterian marriage was generally celebrated in the house of the bride's parents.

(*b*) *Formalities.*—A minister of *any* church can perform a regular marriage, even a Catholic priest; for this purpose, a Jewish Rabbi, or the person to whom the Quakers assign the duty of celebrating a marriage, is a minister.[1]

No form, place, or hour is prescribed by law, while in England there are canonical hours, *i. e.*, between 8 and 12.

The minister is duly qualified if he has been ordained, and a marriage is regular and celebrated *in facie ecclesiæ*, though the ceremony takes place in a private house or in the public street.

Two credible witnesses must be present who know the parties. No special form of words is necessary, but there is generally a solemn admonition by the clergyman; the question of mutual acceptance is solemnly put and an answer required, and a declaration is made by the officiating minister that the parties are husband and wife.[2]

A regular Presbyterian marriage is, in fact, generally celebrated in the house of the bride's parents, though in the upper classes there is a tendency to return to the earlier practice of celebration in the church. The marriage is complete when the consent has been exchanged. Consummation is not necessary. If the man were to die on leaving the church he would leave a widow.[3]

1.—The regulation of the practice as to banns has been in general left to the Church authorities, and has been dealt with in various Acts of Assembly.

By Act 8 of the General Assembly of the Church of Scotland, 1784, session-clerks are prohibited from proclaiming

[1] 4 & 5 Will. IV, c. 28; 17 & 18 Vict., c. 80, s. 46.

[2] J. Muirhead, *Notes on the Marriage Laws*, p. 49.

[3] *Leslie* v. *Leslie*, 1860, 22 D. 993.

parties until the leave of the minister has been obtained. This Act declares that no session-clerk in this Church shall proclaim "any persons, in order to marry, until he gives intimation to the minister of the parish, in a writing dated and subscribed by him, of the name, designations, and places of residence of the parties to be proclaimed, and obtain the said minister's leave to make the said proclamation"; otherwise any certificate of proclamation is to be held as false.

Until 1880, no banns could be proclaimed unless the parties had resided six weeks in the parish. A power of shortening the time of residence or of dispensing with the proclamation altogether was given to the Presbytery of the bounds.

EMILE STOCQUART.

(To be continued.)

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

International Law Conferences.

IT is a matter for regret that the British Government shows so little inclination to take part with other States in efforts to assimilate their municipal legislations on important subjects, or to reconsider rules of public International law, which are not adapted to present conditions. In answer to a question put in the House of Commons on March 12th, the Foreign Office admitted that in 1895 the Government of Holland had consulted our Government and those of the other Maritime Powers as to the expediency of holding an international conference for determining in an uniform way for all nations the distance of the limit of territorial waters from the shore, in accordance with reso-

lutions passed by the Institute of International Law, and confirmed by the International Law Association; but that it and the other Governments concerned thought then, and were still of the opinion, that no advantage could be gained thereby. Another question (*Times*, March 31st), with regard to the draft treaties relating to the law of collision and salvage at sea, adopted at the recent Maritime law conferences organised by the Comité Maritime International at Antwerp (1898); London (1899); Paris (1900); and Hamburg (1902); elicited the reply that the Belgian Government had proposed that these treaties should be submitted to a diplomatic conference, and the matter was still under consideration by our Government. With regard to this latter question, the hope has been already expressed in this Journal that our Government will consider sympathetically proposals which with very small exceptions reproduce the present English law on these subjects: as regards the former, the disadvantages of maintaining the present three-mile limit are too well known to require restating. Another instance of a similar disinclination is furnished by the refusal of our Government in 1893 to take part in the international legal conference on private International law, held at the Hague in 1893, followed by those of 1894 and 1900, attended by representatives of fifteen Continental nations, which have resulted in the Hague Convention of 1896 adopting common rules of procedure on certain points, such as pauper litigants, security for costs and the like, and in another Convention of 1902 dealing with marriage law. After the important work done by Great Britain at the Hague Public International Law Conference, notably in the Arbitration Convention, it is not unreasonable to expect that our Government should take its part in conferences, whether of lawyers or of diplomatists, which seem likely to remove many difficulties in private International law.

Venezuela.

The danger caused by the *impasse* to which at one time the Venezuelan difficulty seemed to have been brought has been averted by diplomatic settlement, and an immediate payment of the first rank claims presented by the blockading Powers. With regard to the other claims, an interesting and novel point in International law is raised by the reference to the Hague tribunal, unless otherwise settled, of the question whether the claims of the blockading Powers are to have priority of payment over those of other States having similar claims against Venezuela, out of the funds assigned by that Republic to Great Britain (30 per cent. in monthly payments of the customs revenues of La Guayra and Puerto Cabello) for the satisfaction of all such claims. Analogies from private law have been drawn, on the one hand in favour of the priority of a creditor who has taken active steps with consequent expense and risk to enforce his rights, and on the other hand in favour of all the creditors sharing *pari passu* without allowing any right of preference to be gained by taking forcible measures. Analogies of this kind are no doubt open to the objection that rules governing the rights of private individuals are not safe rules for guidance of nations in their mutual relations. There is no Court to pronounce on the claims put forward by one Government against another, and States can only obtain execution of their claims by action taken to enforce them themselves; while third parties cannot prevent their being enforced by hostile measures, except by intervening forcibly or diplomatically, in order to protect their own interests or to uphold the international balance of power as Russia, France, and Germany did between China and Japan in 1895, and the European Powers in the war between Turkey and Greece in 1897. But an agreement, as in this case, to submit the question of priorities to a third party, and that a permanent international tribunal set up by the nations

now claiming against each other, implies that the blockading Powers desire that justice shall be done to all creditors of Venezuela on a friendly footing; and the rules of private law governing the relation of creditor and debtor may well be at all events consulted by the Hague Tribunal for suggestions.

If this be so, what position in the law of creditor and debtor most nearly corresponds to the present one? Is the action taken by the blockading Powers in the nature of attachment or taking security for the satisfaction of their claim, or is it in the nature of execution? Although, as already said, in international relations, action by one State is from the nature of things sometimes equivalent to execution, it hardly seems appropriate to regard it as such in this case where the States taking action agree to abstain from enforcing their claims in priority to those of other creditors of the same kind and leaving the question at issue to be decided judicially by an international tribunal. Another consideration pointing the same way under the particular circumstances of the case is the fact that the action taken against the debtor State was no doubt intentionally confined to such measures as are recognised preliminaries to regular hostilities and take their character from subsequent events; and writers on International law, such as Taylor, speak of "an embargo of vessels as a seizure by way of attachment or sequestration, for which the vessels are held not to be condemned as prize"; and the language of authorities like Lord Stowell and Sir Robert Phillimore is the same (*The Boedes Lust*, 5 Cr. Rob. 145; *Int. Law*, iii, 44). On this view, that such action resembles rather an attachment than an execution, it is not necessary to consider the appropriateness of analogies from private law with regard to the rights of an execution creditor in case of subsequent bankruptcy of the debtor, or questions of judicial hypothecs and the

rights of an execution creditor as against creditors who have previously presented claims to the debtor and obtained judgment which they have not followed up; or the effect of prior hypothecs or secured liens on his property, *e. g.*, by previous treaty. Even on this hypothesis, however, in some systems, the creditor who first puts in execution does not obtain priority over others who follow his example, though he did in the Civil law (*Digest*, lib. XLII, i, 61); Burge, *Foreign and Colonial Laws*, ii, 615; iii, 378 and 587).

Regarding, then, the seizure of Venezuelan ships and property as in the nature of an attachment, should that fact give priority to the attaching creditors over other creditors? The measure is one that is recognised in most municipal systems: in England we have the Admiralty process *in rem*, and foreign attachment still surviving in peculiar jurisdictions; in Scotland the arrestment *jurisdictionis fundandæ causa*; in France the "conservatory and coercive measures," such as *saisie foraine* and the like. By the French law it seems that in no case does the fact of one creditor having been the first to lodge an attachment against a sum of money belonging to his debtor, or having been the first to seize his property, give him priority. It is a principle of French law that the order of priority in which creditors seeking payment from the debtor's personal property should be paid is independent of the promptitude with which proceedings have been instituted (Goirand, *French Commercial Law* [1898], 27, 28). The English law on this subject has been thus concisely stated: "The effect of process *in rem* is to give the creditor the security of the *res* so far as it then belongs to the debtor from the time of arrest. The process does not override the rights of others in the *res* previously acquired, whether by contract or by possession in maritime lien. Where several suits are instituted by different persons having this right, and the proceeds of the *res* are insufficient

to satisfy all the claims, the Court orders the proceeds to be divided *pro rata* without reference to the order in which the suits were begun." Another provision of English Admiralty law, however, in cases where a fund is placed in Court by one set of claimants, so as to be available to others, gives the former their costs of so doing, although they do not rank first in respect of their claim. In German law, on the other hand, it seems that the *saisie arrêt* of a ship carries with it the right of lien or hypothec in favour of the seizing creditor, but this does not displace holders of maritime liens (*Civil prozess ordnung*, s. 931).

On the whole, then, the analogy from private law, our own at any rate, may be said to favour all the creditors sharing *pari passu* in the proceeds of the *res* assigned by the debtor, but the attaching creditors to have a prior lien for their expenses which they have incurred for the common benefit.

Alaska.

The Convention (Herbert-Hay) of January 24th, 1903, referring to arbitration the determination of the Alaskan-Canadian boundary will, it is to be hoped, put an end to a *modus vivendi*, the continuance of which is peculiarly unsuitable in a case where title to territory is concerned. The composition of the arbitral tribunal—"six impartial jurists of repute who shall consider judicially the questions submitted to them, after being sworn to impartially consider the arguments and evidence, and to decide thereupon according to their true judgment," recalls the provisions of the projected General Arbitration Treaty between the two countries (see this Magazine, Vol. XXVII, 459) for the decision of questions involving title to territory; and instead of entrusting this duty to a tribunal of six arbitrators and an umpire, which it is understood that our Government stood out for in 1897, it adopts the principle that, in order to arrive at any

decision, the award must have the adhesion of a representative of the country against whom the award is given. The chief question of those submitted to the Court is, of course, the meaning of the clause in the Anglo-Russian Treaty of 1823, "the boundary shall be formed by a line drawn northward from a point on parallel 56° N. following the crest of the mountains situated parallel to the coast till its intersection with 141° W., subject to the condition that, if such line shall anywhere exceed the distance of ten marine leagues from the ocean, the boundary shall be formed by a line parallel to the sinuosities of the coast, and shall never be further distant from it than ten marine leagues." Some of the considerations likely to be submitted to the Tribunal have been already suggested in this Magazine by Professor Gregory of Iowa University (Vol. XXV, 173); and the present treaty, February 1900, expressly provides for effect being given to one of them, namely, that "the Court is to take into consideration any action of the several Governments or representation preliminary or subsequent to the treaties, so far as the same tend to show the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions under the treaties."

Macedonia.

The state of things revealed by the recent Blue Book (1903, Turkey No. 1), shows an ominous similarity between the present position in the Balkan Peninsula and that in 1875—1876: and there can be little doubt that unless the scheme of reforms projected for Macedonia, drawn up by the Austrian and Russian Governments and accepted by the Porte, can be carried out by Turkey effectively, the duty of establishing decent government there, even by force, will devolve upon the Powers signatories of the Berlin Treaty. Article 23 of that treaty, after providing for the case of Crete and the full application there of the organic *règlement*

of 1868, declares that "analogous *règlements* adapted to the local needs shall be equally introduced into the other parts of Turkey in Europe, for which a particular organisation has not been provided by the present treaty. The Porte will charge special commissions in which the native element shall be largely represented with the duty of elaborating the details of these new *règlements* in each province: the proposed schemes of organisation prepared in this way will be submitted to the examination of the Porte, which before promulgating them will take the advice of the European Commission constituted for Eastern Roumelia" (Martens, *Recueil de Traités*, iii, 449). The similar obligations in this respect which Turkey undertook towards Russia in the previous San Stefano treaty were more definite, specifying Epirus and Thessaly by name, and undertaking for the security of the Armenians an amelioration and reform of the conditions prevailing there: and at the Conference at Constantinople the Russian delegates called special attention to these provinces. It will be remembered that that conference was held during the armistice—after hostilities had broken out between Turkey, Servia, Montenegro, and the Bulgarian insurgents—between representatives of the Powers and Turkey "to discuss *inter alia* ways of ameliorating the situation in the East by improving the administration of Bosnia, Herzegovina, and Bulgaria;" and it proved abortive because Turkey would not accept the scheme agreed upon by the Powers on the lines suggested by the British Foreign Office as regards (1) the appointment of the Valis or Governors by Turkey and the Powers jointly, and (2) the International Commission of surveillance. Then, as now, Turkey brought forward a counter scheme of reform, even announcing a new constitution for the Turkish Empire; but Lord Salisbury warned the Turkish Government of the consequences of their refusal, and declared that Great Britain was determined not to sanction the maladministration and

oppression prevailing in those provinces. The armistice ended in March, and in April Russia intervened in the war and compelled Turkey to grant the reforms which she had refused to negotiation.

As a result of the war Roumania, Servia, and Montenegro were recognised as independent of Turkey: Bulgaria was divided into two parts at the instance of Lord Salisbury, the Northern portion being made an autonomous principality of Bulgaria, the Southern portion being called Eastern Roumelia, and put under a Governor-General. This artificial arrangement was put an end to in 1885 when Eastern Roumelia by a popular movement annexed itself to Bulgaria, and the Powers recognised the *fait accompli* (Martens, XIV, 284). In 1895–6 the Armenian disturbances took place: in 1898 Crete obtained autonomy, but in the war with Greece Turkey was victorious.

The reforms asked for in Macedonia on the present occasion correspond very nearly to those demanded for Bosnia, Herzegovina, and Bulgaria twenty-six years ago. The Macedonian Committee in February, 1902, according to the report of one of our consuls to the Foreign Office, "have aims more moderate than they are reported to be, not wishing to annex Macedonia to Bulgaria, but to obtain autonomy for it and thus establish a second Eastern Roumelia, the provisions of the scheme being taken from the constitution of that former province": it includes administration by a Vali appointed for five years, and belonging to the dominant (Bulgar) race, who shall govern with a popularly elected assembly; guarantees of person and property for every citizen; the officials to be of the dominant race, the higher ones being appointed by the Sultan, the lower by the Vali; the Bulgar language to be on equal footing with Turkish; the education of the Christian population to be left entirely to the care of

educational organisations; the Vali to appoint the constabulary; and the execution of the scheme to be carried out by a special commission. In August, 1902, a Turkish Reform Commission presented a scheme to the Turkish Ministers proposing certain administrative and judicial reforms, which was approved: but the British Ambassador at Constantinople declared these proposals to be "palpably inefficient to meet the situation." The consular reports of December, 1902, declared that "the provinces of Turkey in Europe cannot remain in their present deplorable condition, and that apart from any special scheme of reform the Turkish laws are sufficient if executed." The Austro-Russian scheme, in its outlines which have been published, provides for the administration of Macedonia by an Inspector-General to hold office for three years, his recall and succession to be the subject of agreement between the Powers and the Porte; the reorganisation of the gendarmery by European officers; administration by Christians; reform of taxation; justice; and amnesty of political offenders.

Recent Cases.

In *The Manar* (*Times*, March 16) a somewhat novel application was made to the Admiralty Court. British mortgagees of a British ship, who had taken possession of her, sent her on a voyage to a French port; other British subjects, who had furnished the ship with supplies, attached the ship and freight to answer their claim; and the question of their rights *inter se* being raised before the French Court, the mortgagees began proceedings here and claimed a declaration—intended for the information of the French Court as to our law—that they were entitled by English law to the freight. French advocates gave conflicting opinions as to the effect that would be given to such a judgment in a French Court; and the Admiralty Court, while declaring

that it would not allow itself to be made a mere vehicle for information to the French Court, held that the proceedings here, not having been shown to be vexatious and unnecessary, might proceed. Without going into the municipal aspect of the matter, it does not seem quite clear, from the standpoint of International law, what jurisdiction one Court has to allow proceedings to be taken before it with regard to property which is not subject to its process, but is regularly under the process of a foreign Court. Once a foreign Court pronounces on the *status* of property subject to its process, our Courts regard its judgment as conclusive; it is hardly in accordance with the spirit of that comity for an English Court to intervene under such circumstances before the foreign Court gives judgment; and its judgment may well be disregarded by the foreign Court in determining the order of priority of the different creditors which by International law falls within the province of the *lex fori*.

In *The Dallington* ([1903], 19 T. L. R. 280), the Admiralty Court has decided that Belgian pilots, like those of Holland, France, and other countries, though compulsorily taken by vessels within Belgian waters, are not in exclusive charge of them so as to be "compulsory pilots" under our law, with the consequent exemption of the ships employing them for damage done to other persons by the pilot's negligent navigation. This decision lays down the eminently satisfactory principle for guidance in these cases, that it is a question of fact in every case whether the pilot is merely a nautical adviser (as he is in almost all systems but our own), or an independent director of the ship's navigation; and this should clear our law from the confusion caused by the decision in *The Halley* in 1868 (also relating to Belgian pilots), when, on the finding in the Instance Court that the pilot was a "compulsory pilot," though Belgian law did not on that account give any exemption

to the shipowner employing him, the Privy Council held that the exemption given by the English law must prevail.

In *Thomson* v. *Gill* (*Times*, March 31), the Court of Appeal has come to the satisfactory conclusion that a foreign judgment (Scotch) registered in England can be enforced there in all respects as if it were an English judgment, *e.g.*, in the particular case, by having a receiver appointed by way of equitable execution, though at the time of the (British) Judgments Extension Act 1868 conferring this power this was a form of execution unknown to the Court of Common Pleas, which was the Court appointed to exercise jurisdiction for this purpose. It would only be a slight extension of this principle to allow international efficacy to be given in England to the judgments of Courts in foreign countries willing to enter into a convention with Great Britain for this purpose.

In *In re Johnson* ([1903] W. N. 53) the question was raised what law was to govern the succession to a British subject by birth who, when she made the will and when she died, was domiciled but not naturalized in Baden, and left a will which was proved in England, and personal property both in England and in Germany. By the law of Baden the succession to a testator or intestate is governed by the law of the deceased's nationality. The Chancery Court in England, to which the executors applied for directions as to the distribution of the property not disposed of under the will, held that it must apply the law of the domicile: firstly, because there is no change of domicile *de facto* if the law of the domicile disregards domicile, and the law of the domicile of origin therefore remains unaffected; though, if a native of Baden were to die domiciled in England there would be an unavoidable conflict of law, as two different standards would

be set up: secondly, because if it was the duty of the Court to apply the law of the nationality in order to satisfy Baden law, the law of England (which must be taken internationally to be the only law of the British Empire as a whole), as applicable to the particular *propositus*, must be applied, in this case being the law of Malta where the testatrix had her domicile of origin.

In *Fitzgerald's Settlements* (*Times*, March 23rd), a domiciled Englishman married a domiciled Scotchwoman in Scotland, where a marriage settlement in English form of the husband's property, and a contract in Scotch form dealing with the wife's property, were also made. The latter gave the husband a life interest, after the wife's death, in certain securities which, by Scotch law, were real property, and this was expressed to be "strictly alimentary and not assignable or subject to arrestment or other legal diligence at the hands of creditors;" being a valid disposition by Scotch law, but by English law not valid against debts, and the husband mortgaged his life interest. The Court held that the domicile and residence of the husband being English, and the trustees being subject to the English Court by residence in England, English law governed, and the mortgagees were entitled to the life interest, though derived from real property in Scotland, as it was only a personal claim by the husband against the trustees. This holding does not give effect to the intention of the parties, for there can hardly be stronger evidence of intention as to which law should govern the matrimonial property than the fact that the disposition actually made by a Scotch wife of her property would be good by Scotch law and bad by English law; but it follows the general rule that a marriage contract or settlement in the absence of reason to the contrary is construed with reference to the law of the matrimonial domicile (Dicey, 653). It may have been thought by the parties that the provisions

of the settlement showed sufficient evidence of an intention to adopt Scotch law, especially where the settled fund was realty in Scotch law.

G. G. PHILLIMORE.

VIII.—NOTES ON RECENT CASES (ENGLISH).

THE report of *Aflalo* v. *Lawrence & Bullen, Limited,* in the Court of Appeal has now appeared (L. R. [1903], 1 Ch. 318). As already said, the dissentient judgment of Vaughan Williams, L.J., goes on the precise ground on which we based our criticism of the decision of Joyce, J., in our issue of last May (at p. 346). Both Stirling and Romer, L.JJ., base their judgments on the fact that the Copyright Act 1845 requires, in order that the proprietor of an encyclopædia may be entitled to the copyright in articles contributed to it, not merely that the authors should be employed and paid by the proprietor, but that they should be employed and paid on the terms that the copyright is to belong to the proprietor. If, they say, we infer from the employment and the payment the further term that the copyright shall belong to the proprietor, we are practically disregarding the third requisite demanded by the statute. This argument seems to us fallacious. If the statute demanded an express agreement that the copyright should belong to the proprietor, then of course the matter would be different; but neither of their lordships suggests that an express agreement is necessary. Then the sole point is, when a proprietor employs and pays a person for writing an article, and there is no express agreement one way or the other as to whom the copyright shall belong, what in ordinary circumstances is the fair inference? Vaughan Williams, L.J., says that, in ordinary circumstances, the fair inference is that it was intended that the copyright should belong to the proprietor, but special circumstances may show that

this was not the intention. Stirling and Romer, L.JJ., say that, in ordinary circumstances, the fair inference is that it was not intended that the copyright should belong to the proprietor, but special circumstances may show that this was not the intention. If the latter view is right, then what is a fair inference in regard to copyright is precisely the reverse of what would be a fair inference in any other transaction of life.

Van Praagh v. *Everidge*, which we doubted in our issue of November last (at p. 95), has now been reviewed by the Court of Appeal and reversed (L. R. [1903], 1 Ch. 434). It may be remembered that the facts were shortly as follows: The defendant intending to buy one of several properties to be sold at an auction, attended the sale, and by his own mistake bid for a property altogether different from the one he wished to buy, and it was knocked down to him. Immediately afterwards he discovered his mistake and repudiated his bargain. The auctioneer, however, signed the contract form and an action was brought to enforce the contract. Kekewich, J. (L. R. [1902], 2 Ch. 266), decreed specific performance. On appeal the case was decided on a point scarcely raised or, perhaps, more accurately, scarcely heard in the Court below, namely, whether even assuming the auctioneer had authority to sign the contract, the contract itself satisfied the Statute of Frauds, since it was a contract originally drafted in contemplation of a sale on a different day, and so bore a wrong date, as did also the conditions of sale. The Court of Appeal were agreed that the memorandum was not sufficient to satisfy the statute. The ground of our objection to the decision of Kekewich, J., was that there never was any contract, since the parties were never *ad idem*. This point was not argued, but Collins, M.R., expressly stated that, while not deciding it, he was of opinion that the parties never were *ad idem*.

In *In re Browne's Policy, Browne* v. *Browne* (L. R. [1903], 1 Ch. 188), a husband had effected a policy of insurance on his life expressed to be "for the benefit of his wife and children in conformity with the provisions of the Married Women's Property Act 1882." When he effected this policy he had a wife and children living. The wife died during the husband's life and he remarried, and his second wife survived him. Kekewich, J., held that the second wife was entitled to share with the children in the insurance money. His lordship's attention was not drawn apparently to several decisions as to the gifts by will to a person's "wife" and children, which seem very relevant. Thus in *In re Lyne's Trust* (L. R. 8, Eq. 65), Malins, V.-C., held that, under a bequest in trust for A. for life, and on his death amongst A.'s wife, should she survive him, and all his children equally, a second wife was entitled to share. The ground was, that as the children of a second wife would be entitled to share, so should be the second wife. In *In re Burrow's Trusts* (10 L. T. Rep. 184, which had not been brought to the attention of Malins, V.-C.), Kindersley, V.-C., had previously held that this consideration was not a sufficient reason for departing from the general rule of construction that an individual description, where there is any person in existence answering it at the time the document was executed, applies only to that person. In *In re Drew* (L. R. [1899], 1 Ch. 336) the same point turned up, but Stirling, J., in the conflict of authority, declined to decide it, preferring to base his judgment on another ground. In this state of things it seems a pity that Kekewich, J., had not an opportunity of considering the authorities before deciding the point.

One of the most ignoble features in the frequent ignoble struggles between a deceased person's children over his estate, is the mode in which they try to get every kindness to a child done by the dead father during his life turned into an "advancement" and so taken into account in settling

that child's share. We have known of attempts made to deprive widowed daughters and orphan grand-children of all share in the estate, on the ground that their share had been advanced to them, because the deceased had during his life given them an allowance for their maintenance. In view of such doings, the decision in *In re Scott, Langton* v. *Scott* (L. R. [1903], 1 Ch. 1) is satisfactory. The principle of that decision is, that to be an "advancement" the money given must be intended as an advancement. If it is intended to be a gift or to be in the nature of temporary assistance (as Jessel, M.R., said in *Taylor* v. *Taylor*, L. R. 20 Eq. 155), it is not an advancement. No doubt the receipt by a child of a considerable sum is *primâ facie* evidence of an advancement. But all the circumstances are to be looked to, and if these indicate that there was no such intention the presumption is rebutted.

In *Mason* v. *Ogden* (L. R. [1903], 1 A. C. 1), the Lord Chancellor, when the point was put in argument that if the decision below was reversed this would upset the practice of conveyancers, observed that, if necessary, he should have no hesitation in upsetting that practice. This is heroic, but it is hardly the game. It merely shows that whatever the Lord Chancellor may have been, he has never been a conveyancer. Judges who have been conveyancers hesitate long before they disregard a practice that has long been followed by conveyancers, not out of any fondness for such practice, but because they do not know what mischief their upsetting such practice may not do. If such a practice has long been followed, thousands, perhaps tens of thousands, of instruments have been drafted on the assumption that it is correct. By upsetting it, consequently as many thousands of innocent persons, no parties to the case, may have their titles upset too. Even a Lord Chancellor might pause and even hesitate before doing this.

In *In re Gossling, Gossling* v. *Elcock* (L. R. [1903], 1 Ch. 448), the Court of Appeal have reversed the decision of Swinfen Eady, J., but only on the construction of the will. The gift was in trust to pay and transfer equally certain money and stock to two children on their attaining twenty-one, and meanwhile to apply the income for their maintenance. Swinfen Eady, J., held that the whole income was given for their joint maintenance, and the Court of Appeal has differed from him as to this. The further point decided by him, that when the income is given for the joint maintenance of children it does not operate to vest their respective shares, has therefore been left untouched. Indeed, from the language used by Romer, L.J., it would seem that he at least, if he had agreed with Swinfen Eady, J., that the income was given for the children's joint maintenance, would have agreed with him on the other point too.

J. A. S.

Tagart, Beaton & Co. v. *James Fisher & Sons. West Hartlepool Steam Navigation Co., Limited,* third party (L. R. [1903], 1 K. B. 391), takes rank as the leading case on lien on sub-freights. By a charter-party the owners of the ship had a lien on sub-freights for any amount due under the charter. But as security for the promise in a freight-note to pay £1,000, the sub-freight on a cargo brought from a foreign port to this country was pledged by the terms of the note, which also directed the charterer's agents to pay the claim, "from the first amount due for freight." The holders of the note gave notice to the agents that they held the document, and sent the note for presentation to them through bankers. But before sufficient money to satisfy the claim had been collected by the agents, they received a notice of the shipowners' lien on the freight, and a claim under the liên for arrears due on account of ship hire unpaid. Under these circum-

stances, the holders of the freight note brought an action against the agents for the amount of their claim, and obtained judgment. And this judgment was confirmed on appeal, on the ground that "the moment the freight has been paid over by the consignees to persons who are entitled to receive it, the shipowner's right to stop it on its way ceases to exist." His "right to lien is gone." There is no earlier reported case on the point, and the text books treat the question as an open one. The ship-owner should have given notice of his lien to the consignees and not to the charterer's agent.

In *Smith* v. *Gold Coast and Ashanti Explorers, Limited* (L. R. [1903], 1 K. B. 285 and 538; 88 L. T. R. 202; 38 L. J. 48), the Courts have been again called upon to decide what is the meaning of the words "within the space of one year" in that part of sect. 4 of the Statute of Frauds which enacts that no action shall be brought whereby to charge any person upon an agreement, that is not to be performed within that space from the making of the agreement, unless some note or memorandum thereof shall be in writing signed by the person charged or his authorised agent.

The plaintiff was engaged verbally on the 6th December, to act as solicitor to the defendant company for one year from the 7th December, and, in an action by him for damages for breach, the judge ruled that the case fell within the statute, and directed the jury to find for the defendants.

The plaintiff appealed to the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.), who, adversely to the argument of the defendant company, that a service to commence *from* the 7th meant a service to commence *on* the 8th, held in accordance with *Cawthorne* v. *Cordery* (13 C. B., N. S., 406, and *Britain* v. *Rossiter*,

11 Q. B. D. 123), that a contract for a year's service to commence on the day next after the day on which the contract was made is not an agreement which is not to be performed within a year from the making. On this the defendants in turn appealed, and the argument was again pressed that the contract was for a year commencing on the 8th December; but the Court of Appeal (Vaughan Williams, Stirling and Mathew, L.JJ.) was of opinion that there was evidence for the jury of a contract to employ the plaintiff for a year beginning from the date of the contract, and ordered a new trial.

In the old case of *Peter* v. *Compton* (1 Sm. L. C.), it was ruled that if the agreement could by any possibility be performed within the year, the statute does not apply.

Rex v. *Lynch* (L. R. [1903], 1 K. B. 444; 88 L. T. R. 26; 38 L. J. 61) has made it clear for anyone who doubted, that the Naturalization Act of 1870 gives no power to a British subject to become the subject of a foreign country which is at war with Great Britain. Though he may "at any time after the passing" of the Act, when in any foreign State and not under any disability, become naturalized in such State, this may not be done while war exists between the States: for there is the paramount claim of his country to his allegiance, antecedent to the Act and not impaired by the Act. And this is reasonable, for if a contract between citizens of this country and of a belligerent State, where nothing more important is in question than goods and their value, is void when entered into in time of war, it would be absurd to uphold one made not between mere private citizens of the opposed powers, but where one of the parties was the opposing State itself; not merely where the object was the ordinary conveniences of commerce, but where it was to enable a traitor to strengthen the enemy's power

against the State that was to support the agreement. This would be to attach disabilities to trade from which treason would be free; to enable a renegade to transfer a fleeting fealty to every enemy of his native land, and even to resume all the privileges of his birthright, without any legal punishment for his treachery, in the intervals when there was no opportunity of working mischief to his country. This was certainly not the aim of the Naturalization Act, and the Court has shown that no reading of the Act can afford such an interpretation. But there was another incident of the case which, though of less general importance and interest than this great principle, was conclusive against the defendant, that he, before obtaining letters of naturalization, had signed a declaration of willingness to take up arms for the belligerent State. This was a treasonable pledge which the naturalization, coming later, would not have condoned, even if the Act had permitted a transfer of nationality to the enemy in time of war.

The decision also confirmed a point of established practice, viz., that, in a treason case, although it is within the discretion of the Court to entertain a motion to quash an indictment on the ground of insufficiency, the proper course is by motion in arrest of judgment or upon a writ of error.

T. J. B.

SCOTCH CASES.

Two cases bearing upon the formalities of the constitution of contract have been decided within the past few months. The Special Case, *Campbell's Trustees* ([1903], 40 Sc. L. Rep. 335), is chiefly interesting as bringing into sharp contrast the Scottish and English forms of the execution of deeds, and determining the effect of formalities prescribed by the parties themselves. An ante-nuptial marriage contract between a domiciled Scotsman and an English lady gave

a power of appointment in certain circumstances to the spouses and the survivor, to be exercised by a writing "sealed and delivered in the presence of and attested by two credible witnesses," or by "his or her last will and testament in writing or any codicil or codicils thereto to be by him or her signed and published in the presence of and attested by three credible witnesses." The husband, as the survivor, purported to exercise the power by a trust disposition and settlement duly executed in the usual Scottish form before two witnesses, and also by four separate papers of directions which, being holograph of the grantor, would have been probative according to the law of Scotland. None of the documents was executed with the formalities prescribed by the contract itself, and the Court therefore held them to be ineffectual for the purpose intended. It was argued that the contract only meant that the power should be exercised in conformity with the law of England for the time being, and that as by the Wills Act of 1837 (passed after the date of the marriage contract) the law of England had been altered, the deeds should be allowed effect. The Court, however, held that the law of England was matter of fact and not of law in Scotland, and that in a Special Case such as this it could not be taken into account unless admitted. On the main question, the Court had no hesitation in finding that the formalities prescribed by the parties must be adhered to. There is much force in the words of Lord Adam :—"We are familiar enough in Scotland," he said, "with parties taking the law into their own hands and declaring that any writing found under their hand, whether formal or informal, shall be a sufficient appointment, and I see no reason to think that, when parties instead of dispensing with solemnities have declared additional solemnities, they should not be entitled to make a law for themselves."

The other case affecting the solemnities of deeds was *Snaddon* v. *London, Edinburgh and Glasgow Assurance Company, Limited* ([1902], 40 Sc. L. Rep. 164). The question as decided by the Lord Ordinary (Kyllachy) was whether a guarantee was probative where one of the instrumentary witnesses had signed as such without either seeing the grantor sign or hearing him acknowledge his signature. The Lord Ordinary not only held the guarantee improbative but further held that it could not be validated by *rei interventus*. On appeal, the Court adhered to the result, but founded their judgment on totally different grounds. They were not prepared to affirm that a contract of guarantee was invalid because it was not executed with all the solemnities of a deed, but they held that the creditor had put himself out of Court by failing to communicate to the cautioner a fraud committed by the debtor and affecting the obligation. On the question of the constitution of the contract of guarantee, one is tempted to contrast Lord Kyllachy's present utterance with that delivered by him in *Bryan* v. *Butters Brothers* ([1892], 19 Ret. 490), in these terms:—"There is nothing in the statutes or in the principles of our law of evidence to require that all writings put in evidence shall be *per se* probative. . . . . The constitution of obligations is one thing; their proof is another; and where the obligation may be constituted verbally and may be proved either by writ or by oath, it would require, I think, some positive rule of law to make more necessary than that the writ, if writ is adduced, shall be genuine."

The Scottish Supreme Court continues to contribute its full *quota* of cases tending to elucidate the Workmen's Compensation Act, 1897. The following are among the most recent judgments. A miner who left the pit-head where he was working, and went for a few minutes to the boilers to get a drink of water, was struck in returning

by a runaway hutch and killed. He was held to have met his death "in the course of his employment" in the sense of sect. 1 (1) of the Act. (*Keenan* v. *Flemington Coal Company, Limited* ([1902], 40 Sc. L. Rep. 144). A workman employed as a lorryman by a firm of drysalters was injured while removing casks from their premises to his lorry. It having been proved that from 85 to 90 per cent. of the drysalters' business was retail, it was held that the premises did not constitute a "warehouse" but a shop, and that therefore the provisions of sect. 7 of the Act did not apply (*Colvin* v. *Anderson and Gibb* [1902], 40 Sc. L. Rep. 231).

Under the Schedules appended to the Act it was held that a workman whose thumb had been amputated, and who refused to undergo a simple surgical operation which would in all probability have removed the sensitiveness of the injured part, was liable to have a weekly allowance formerly adjudged to him reduced from a substantial to a nominal sum until the further orders of the Court (*Anderson* v. *William Baird & Company, Limited* [1903], 40 Sc. L. Rep. 263). For similar reasons, under sect. 13 of Schedule II, a workman, whose ancle had been injured and who had culpably failed to adopt reasonable and proper means for its cure, was held to have forfeited his right to the weekly payments formerly allowed him, and these were accordingly brought to an end. (*Dowds* v. *Bennie & Son* [1903], 40 Sc. L. Rep. 239.)

Where weekly payments are submitted to review in terms of sect. 12 of Schedule I, the alteration, if any, does not date from the occurrence of the alleged change in the workman's condition, nor even from the date of the application for review, but only from the date of judgment. As between the date of the application for review and the date of the judgment, the Court (dissenting the Lord Justice-Clerk) refused to follow the judgment in the English case, *Morton &*

Company Limited v. *Woodward* ([1902], 2 K. B. 276). (*Steel* v. *Oakbank Oil Company, Limited* [1902], 40 Sc. L. Rep. 205.)

In calculating the weekly earnings of a workman under sect. 1 (a) of the First Schedule, the total earnings for the period of employment fall to be divided by the number of "trade" weeks and not by the number of calendar weeks in which he has been employed (*Campbell* v. *Fife Coal Company, Limited* [1902], 40 Sc. L. Rep. 143).

R. B.

IRISH CASES.

Processions, ranging from marches of the unemployed up to State pageants, have become so common in our streets that it is of some interest to ascertain when such a gathering, with the consequent obstruction of foot-passengers and traffic, ceases to be legal and exposes those taking part in it to criminal liability. The general answer of course involves an extremely vague test: did the procession, under the circumstances, exceed a reasonable user of the street? Some further light is thrown on the question by *Lowdens* v. *Keaveney* ([1903], 2 Ir. R. 82). Members of a band had gathered, apparently for the purpose of proceeding to a railway station, and were accompanying their progress by playing airs likely to cause dissatisfaction to the inhabitants of the district in Belfast through which they were passing; they were, in fact, according to the more compendious Irish expression, "playing party tunes." Naturally, they were followed by a crowd. A police-constable, fearing an obstruction and a possible disturbance, cautioned them against playing through a particular street. Disregarding his warning, they continued to play: no riot followed, but the attendant crowd caused a temporary obstruction to the free passage of foot-passengers and vehicles. A number of the bandsmen were charged before the magistrates, under 14 & 15 Vict. c. 92, s. 13, with "wilfully preventing and

interrupting the free passage of persons and carriages in a public street." The magistrates, relying apparently on the police warning as establishing the illegality of the proceedings, convicted, but stated a case. They found as a fact that obstruction had been caused by the band and the accompanying crowd, and asked the judgment of the Divisional Court solely as to whether the defendant was legally responsible for the obstruction to the public thoroughfare caused by the band playing, such defendant being a member of the band who played after being cautioned by the police to desist. The Court was of opinion that the magistrates had not sufficiently considered the vital question, whether the user of the streets was unreasonable under the circumstances—or what is the same thing from another point of view, whether the obstruction admittedly caused by the playing, but admittedly temporary, was unreasonable. Again, there was no finding that the temporary obstruction due to the accompanying crowd was *wilfully* caused by the bandsmen, and this also was an essential ingredient in the offence. Further, they appeared to attach an undue efficacy to the police warning. If the defendants were only reasonably exercising their rights, then on ordinary principles no police warning could affect the matter: if their conduct was unreasonable, the warning would be unnecessary except as evidence of wilfulness. At common law, a procession only becomes unlawful as an unreasonable and excessive user of a highway, and therefore a nuisance. And the obstruction under the statute must be in the nature of a common-law nuisance, wilfully caused.

Every lawyer who has had to advise on the interpretation of wills knows the strange liking of so many testators, and even sometimes of their legal advisers, for using the word "heir" in dealing with personalty. Doubt nearly always arises, in such cases, as to whether the testator really meant

heir or next-of-kin. The rule as laid down in *De Beauvoir* v. *De Beauvoir* (3 H. L. C. 524) is simple enough in its terms: *prima facie* a gift of personalty to the heirs of an individual goes to his heir-at-law as *persona designata.* But this rule is liable to be, and very often is, controlled by the context, when "heirs" will mean next-of-kin: so it will be, for example, in a gift to A. *or* his heirs (*Vaux* v. *Henderson,* 1 J. & W. 388). In *Skinner* v. *Gumbleton* ([1903], 1 Ir. R. 36), a testator devised his real estate in trust for his eldest son for life, with remainders over in tail, and an ultimate remainder to his right heirs, and bequeathed his personalty on similar trusts, with an ultimate remainder to his "right heirs and assigns." The Vice-Chancellor held, on a summons as between the heir-at-law and next-of-kin of the testator, that the heir took as *persona designata.* So far from there being any context to qualify the primary meaning of the words, the whole scope of the will appeared to show a desire to keep all the property together. But notwithstanding this decision, it is so obviously unsafe from a conveyancer's point of view to have the ultimate destination of property depending on such flexible considerations as the effect of a context, and so easy to introduce words definitely pointing to an heir as *persona designata,* that the loose and vague expression should never be used in gifts of personalty.

A testator gives certain property to three persons as tenants in common; the gift is in terms absolute, but is in fact subject to a secret trust. At the time when the will is made, only one of the legatees is aware of the trust, and it is not communicated to the other two until after the testator's death. *Geddis* v. *Semple* ([1903], 1 Ir. R. 73), in the Court of Appeal, decides that under these circumstances the trust attaches only to the share of the legatee to whom it was communicated in the testator's lifetime, and that the other two tenants in common take their shares absolutely.

The only interest of the case is in its recognition of the distinction, which has been sometimes doubted, between gifts of this sort to tenants in common and to joint tenants. In the latter case it is doubtful whether the shares of all the joint tenants are not bound by the trust; the better opinion is, that all the joint tenants are bound, at all events where the will is made on the faith of an antecedent promise by one that he will carry out the trust. See *In re Stead, Witham* v. *Andrew* ([1900], 1 Ch. 237).

What is a factory? This perennial conundrum, under the Workmen's Compensation Act, continues to receive fresh and more extensive answers. A dry dock may clearly be a factory, since the decision in *Raine* v. *Jobson* (L. R. [1901], A. C. 404), but the authorities have been slower in deciding, what now appears to be the law, that a wet dock may be a factory also. In *Hanlon* v. *North City Milling Co.* ([1903], 2 Ir. R. 163), a labourer, who was not a seaman, was employed to bring the employers' barges, kept in their dock at night, from their places in the dock out to vessels in the river, for the purpose of bringing cargo from such vessels to the quay-side. While engaged in this employment the labourer fell into the dock and was drowned. The Court of Appeal held that the labourer's widow was entitled to compensation under the Act. Walker, L.J., puts the result of the latest authorities as to docks very neatly:—"It follows, in my opinion, (a) that the mere employment of machinery is immaterial; (b) that a man employed on a ship lying in a wet dock is employed in a factory; (c) that the owners of the ship occupy the wet dock by the definable space in which the vessel lies; and it seems to me a matter of degree only, and not of principle, that the vessel is a barge and not a sailing or steam ship."

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

The Yearly County Court Practice 1903. 2 vols. By G. PITT-LEWIS, K.C., Sir C. ARNOLD WHITE, and A. READ. London: Butterworth & Co. 1903.

The Annual County Courts Practice 1903. 2 vols. Edited by WILLIAM CECIL SMYLY, K.C., assisted by WILLIAM JAMES BROOKS, M.A. London: Sweet & Maxwell. 1903.

The only Courts in which business seems to steadily increase are the County Courts, and if some of the projected legislation is carried out this increase will become much more marked. In this event there will probably be a considerable number of new rules issued, and the appeals will be much more numerous, and more important. From the point of view of the Editors of these two well-known books of practice the past year has been an uneventful one. No statutes have been passed specially affecting County Courts; and the appeals in cases under the Workmen's Compensation Acts have not been so numerous, though perhaps Mr. Smyly is too sanguine in hoping "that most of the doubtful questions arising on the Acts have at last been settled." Mr. Pitt-Lewis, however, may be considered less hopeful, as he has dismal forebodings that the consolidating and amending provisions of the Factory and Workshop Act 1901 have "the effect of covertly extending the Workmen's Compensation Act to an extent which can hardly be defined." The special new feature of the Yearly Practice is the care which has been bestowed on re-writing and bringing up to date the notes on the two very important subjects of Costs and Appeals; and there is in addition an useful note on the effect of the common practice of sending "a cheque in settlement." The law on this subject is taken from the judgment of Bowen, L.J., in *Day* v. *McLea* (which we notice is cited again and again as *Day* v. *Macrea*), and is given, though not quite in the words of the report, as follows: "To make a good accord and satisfaction there must be *either* two minds agreeing, *or* one of two persons acting in such a way as to induce the other to think that the money is taken in satisfaction, and to cause him to act upon that view." The chapter on, and the precedents of, costs, are by Mr. Morten Turner, the registrar of the Watford County Court. The special attention directed to Admiralty cases is continued, and we

again have the so-called "Sea Rules" given, and commented upon. The reference in the index to the benefit of the Workmen's Compensation Acts being extended to dock labourers by the last Factory Act, is to the wrong page. In the *Annual Practice* attention is particularly called to the Bankruptcy (Administration Order) Rules 1902, which the learned Editor considers "undoubtedly an improvement on those they supersede." It is interesting to compare the indexes of these two valuable works and notice how they vary in the number of headings they respectively give to different subjects, or statutes.

Carson's Real Property Statutes. By THOMAS H. CARSON, K.C., and HAROLD BOMPAS. London: Sweet & Maxwell. 1902.

Though the title looks new this is an old and valued friend, being the tenth edition of *Shelford's Real Property Statutes.* Mr. Carson having edited the last two editions thinks, very rightly, that he is justified in putting his own name to his own work. There are very important alterations and additions. Ten years have elapsed since the last edition, and during that time Acts of the importance of the Land Transfer Act 1897 and the Trustee Act 1893 have, among others, been passed. The numerous and valuable notes have been re-arranged, revised, and developed, and references to no less than 2,000 new cases have been added. Dealing as it does with so many subjects of the first importance, and giving the text of the governing statutes and learned and excellent notes, the book is an invaluable one. To get an idea of its importance it is only necessary to glance over the titles of some of the subjects it deals with. We find Prescription, Limitation of Actions, Married Womens' Property, Wills, Conveyancing, and Trustees. A good illustration of the way in which the work is done is to take the very first subject, Prescription, and we find over 100 pages devoted to the text and elucidation of the Prescription Act 1832—and the print of the notes is small—Rights of Common, Ways, Watercourses, Support, Pews, Light, and Air, are all dealt with at length. There is a substantial list of Addenda and Corrigenda bringing up the cases to December, 1902.

The English Reports. Vols. XXI—XXV. Chancery 1—5. Edinburgh: William Green & Sons. London: Stevens & Sons. 1902–3.

The Reports of the House of Lords and Privy Council being finished the Chancery Reports have been begun; and the five

substantial volumes before us, containing certainly over ten thousand cases, have been issued in the course of the last five or six months. There is unavoidably a good deal of repetition, the same cases being sometimes reported three or four times. The Reports included are:—Cary, Choyce Cases in Chancery; Tothill; Dickens; Reports in Chancery; Nelson; Equity Cases Abridged; Cases in Chancery: Freeman; Reports *temp.* Finch; Vernon; Precedents in Chancery; Peere Williams; Gilbert; Select Cases *temp.* King; Mosely; W. Kelynge; Cases *temp.* Talbot; and West *temp.* Hardwicke. The dates of the decisions run from about 1469 to 1794. It is not clear of what nature the early cases were, and whether they were taken from legal works or judgments, but the Lord Chancellors whose decisions are included are:—Heath; Bromley Hatton; Ellesmere; Verulam; Clarendon; Shaftesbury; Nottingham; Jeffreys; Somers; Cowper; Harcourt; Macclesfield; King; Talbot; and Hardwick. We have besides, the decisions of numerous Lord Keepers, Lord Commissioners, and Masters of the Rolls. It is interesting to see how early some of the familiar maxims of equity appear; and it is also remarkable what a very large number of these old cases are noted by the Editors as having been referred to, followed, discussed, and sometimes over-ruled in recent cases. This is a substantial proof of the value of these Reports, and if more was wanting it would be given by the large number of Leading Cases we find reported here. To take the Leading Cases included in White and Tudor's well-known collection alone, we find here:—*Lord Glenorchy* v. *Bosville*; *Keech* v. *Sandford*; *Lake* v. *Craddock*; *Tollet* v. *Tollet*; *Noys* v. *Mordaunt*; *Streatfield* v. *Streatfield*; *Hulme* v. *Tennant*; *Marsh* v. *Lee*; *Garth* v. *Cotton*; *Cuddee* v. *Rutter*; *Pusey* v. *Pusey*; *Duke of Somerset* v. *Cookson*; *Ward* v. *Turner*; *Bassett* v. *Nosworthy*; *Silk* v. *Prime*; *Scott* v. *Tyler*; *Robinson* v. *Pett*; *Hooley* v. *Hatton*; *Talbott* v. *Duke of Shrewsbury*: *Wilcocks* v. *Wilcocks*; *Blandy* v. *Widmore*; *Earl of Oxford's Case*; *Eyre* v. *Countess of Shaftesbury*; *Warmstrey* v. *Lady Tanfield*; *Huntington (Earl)* v. *Huntington (Countess of)*; *Thornbrough* v. *Baker*; *Howard* v. *Harris*; and *Peachy* v. *Duke of Somerset*. Besides these, and great numbers of other most important cases, there are many cases of high interest, as showing the growth of the practice of the Court, and throwing light on the habits and customs of the times. We find the Court either allowing or refusing the claims of other jurisdictions, such as the Universities, Wales, the

Commissioners of the North, and the various Palatine Courts. We see the privilege of Counsel and Attorney growing up to refuse to disclose any information they have acquired in their professional capacities, *Dennis* v. *Codrington*, *Strelly* v. *Albany*; although this was first refused the poor scriveners, *Shalmer* v. *Tresham*. We find suits dismissed because the subject-matter is of too small a value, and some stringent measures taken against irregularities of both the Bar and solicitors; as in *Hill's Case*, where the unfortunate "Mr. Hill having put in for his client a long insufficient demurrer to a bill exhibited against his client, in which supposed demurrer were many matters of fact, and other things frivolous and vain, the Lord Chancellor Egerton awarded five pounds costs against the party; and ordered that neither bill, answer, demurrer, nor any other plea should from henceforth be received under the hand of the said Hill." Another bill is dismissed because the counsellor's hand was put to it "without his privity." In *Whitlock* v. *Marriot*, for a scandalous answer we find the defendant fined £100, and his solicitors, who had forged the counsel's name, £20, and committed until payment. Nor are the officers of the Court safe, as we find costs recovered against a clerk who made out a wrong subpœna. A significant sign of the times, even under Elizabeth's firm rule, was shown in *Bracebridge* v. *Bracebridge*, where "The plaintiff recovered her dower at Common law, but by the potency of the defendant kept from execution, and relieved here." A number of questions about tithes are decided, and a number of points arise connected with the customs of the City of London, and the rights of orphans there. There are two or three cases which show that there must have been considerable commercial intercourse with Italy; and it is curious to note that there seem to have been different legal rates of interest in England, Ireland, and the Colonies. There are some actions showing the jealous scrutiny with which the East India Company regarded all attempts to infringe their monopoly, and the manner in which they proceeded against "*interlopers*." New River shares seem to have been decided to be real property by agreement in *Lord Sandys* v. *Sibthorpe*. Bills were brought for many curious purposes, and in *Young* v. *Burrell* we find that the ungallant "plaintiff sueth for tokens he delivered to the defendant, as a suitor in marriage, and obtaineth them." The token seems to have been "a tablet or pomander in gold." The iniquities of the then law of marriage are well illustrated by some of the cases. One poor little maid of nine, who had been

entrapped into a marriage, and was ordered to be separated from her husband, "wept sore" on leaving him. The age for marriage was gradually increasing: in the early years we find the usual limitation to be sixteen years, but later on it becomes eighteen. But even the limitation of sixteen did not save Sir Henry Wood's daughter from being married to the Duke of Southampton before she was fourteen, *Duke of Southampton* v. *Sir Cæsar Cramborne.* It is rather a surprise to find it decided without dispute in *Hyde* v. *Hyde* that an infant male may make a will of his personal estate at 14, a female at 12. There are some cases as to how peers and peeresses put in answers and answer interrogatories. As regards historical and constitutional information we find it decided in *Christian* v. *Corren* that an appeal lay to the King in Council from a decree of the Earl of Derby, King of the Isle of Man; and in the *Duke of Queensberry's Case*, that since the Union a Scotch peer, made an English peer, cannot by virtue thereof sit and vote in Parliament. In this case the interesting question was debated whether the King could make a man a peer against his will. Allusions to past troubles are found in *Harrison* v. *Lord North*, where the question is debated whether a tenant held out by force by soldiers in time of rebellion shall for the time be relieved in equity against payment of his rent; and in *Dyer* v. *Tymewell* relief was obtained from the defendant who, "being a justice of the peace in the West when the prosecution was there about Monmouth's plot, by terrifying the plaintiff that he was like to be prosecuted, got £50 out of him." The case of *Mayor of London* v. *Bennet* shows a strong exercise of the prerogative in an injunction being granted "to stop Suits of Bankers who lent the King Money." Other signs of the times are suits connected with money won by gaming; in *Humpreys* v. *Rigby* the game was all-fours, and the defendant seems to have turned up the knave of clubs, "which was jack," too often; and in other cases the gambling medium seems to have been dice. Some of the decisions are hardly law now, such as the holding that a husband has by law a right to the custody of his wife, and "may if he thinks fit confine her," in *Atwood* v. *Atwood;* that the maxim "*Ignorantia juris not excusat*" was in regard to the public that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases, *Lansdown* v. *Lansdown;* and that an appeal lies to the House of Lords for costs only, *Gould* v. *Granger.* Other interesting and curious cases are those where the question arose of the language in which the

pleadings were to be; a suit about the great Pitt diamond, *Child* v. *Pitt;* and about a sort of Siamese twins where the Court disapproved highly of a monstrous birth shown for money, *Herring* v. *Walround.* There is much more that might be referred to, but we can only now call attention to a few quaint phrases and head notes, such as that of Lord Egerton in 1559, when he "pronounced openly that he would give none aid in Chancery for the maintenance of any perpetuities nor of any lease for hundreds or thousands of years made of land *holden in capite;* because the latter be grounded upon fraud, and the former be fights against God"; and the headings "Bill in equity lies to recover back money paid on a bubble," "Inequity takes away equity." Mr. Max A. Robertson and Mr. Geoffrey Ellis, who are responsible for the work on four of the volumes—Mr. Robertson being also responsible for the notes to the other volume—are to be congratulated on the result of their labours. The notes seem most carefully prepared, and the misprints are few for such a mass of material.

Scott's Cases on International Law. By JAMES BROWN SCOTT. Boston: The Boston Book Company. 1902.

This is based on the late Dr. Freeman Snow's cases and opinions on International law, and consists mainly of a large number of decisions, or parts of decisions, of the English and American Courts. We think there is a considerable preponderance of American cases, but there is a very valuable collection of English ones as well. The book is of a very reasonable size, which has been obtained by a judicious curtailment of many of the cases; for instance, the judgments in the famous case of *Queen* v. *Keyn* which in the Law Reports fills nearly 180 pages, has by the judicious expedient of limiting it to a portion of Cockburn's judgment been reduced to 16 pages. Mr. Scott's view is that "Judicial decisions are an important and indispensable source of authority in International law." These cases are supplemented by numerous excellent notes, referring to other cases, diplomatic correspondence—almost entirely, we think, American—and opinions of text writers. Mr. Scott shows a most commendable fairness and impartiality, and has even something to say for Great Britain, in the Don Pacifico case. We are glad to have the latest American views as expressed in the decisions of their Courts, in the cases of the prizes taken during the Spanish American war. We have not come across notices of any of the questions that arose during the recent South African war, such as the disputes

about contraband of war, the status of the Transvaal, and taking troops over Portuguese territory. A very valuable part of the book is an elaborate Syllabus whose object is expressed to be "to round out the principles developed and established in the text. It cites the cases and also refers to the authoritative writers of England, America, and the Continent." For purposes of reference and detailed study of individual branches of the subject this would prove most useful, containing, as it does, references to the most recent and authoritative treatises. The public attention is so much directed to the question of aliens just now, that some of the American cases on the subject are particularly interesting, such as *Fong Yue Ting* v. *United States*, which deals with the right of a government to exclude aliens, and *The City of New Orleans* v. *Abbagnato*, where was discussed the liability of a municipality for injury to foreigners caused by mob violence. The note to this case is most interesting as pointing out "certain defects, as regards the conduct of foreign relations, in the federal system of the United States."

Second Edition. *Evidence on Commission.* By W. E. HUME-WILLIAMS, K.C., and A. R. MACKLIN. London: Stevens & Sons. 1903.

This is a second edition of a work published in 1895, and contains all that is known on the practice of taking evidence not only on Commission, but also by Special Examination, Letters of Request, Mandamus, and Examinations before an Examiner of the Court. Everything is very clearly set out, and numerous suggestions are made as to what might with advantage be included in orders, though it is not always the present practice to do so. The part treating with examinations under letters of request is particularly valuable, as it may save English Counsel from languishing in foreign dungeons; and owing to the fact that in some foreign countries English Counsel are not allowed to examine or cross-examine—the short summary of the principles of the English laws of evidence, given in English, German, and French, is likely to prove very useful to foreign advocates who may be engaged. According to Mr. Stringer letters of request are practically superseding Commissions, even in our own Colonies.

Third Edition. *Debentures and Debenture Stock.* By PAUL FREDERICK SIMONSON, M.A. London: Sweet & Maxwell. 1902.

The last edition of this work was published in 1898, but the passing of the Companies Act 1900 has necessitated the issue of

a new edition. The increasing importance of Debentures quite justifies the existence of a treatise confined entirely to that subject, and the manner in which Mr. Simonson carried out his undertaking has rendered his book a most valuable one. Besides the changes and additions rendered necessary by the Finance Act 1899 and the Companies Act 1900, the cases decided since 1898 have been added, and to some of the more important ones attention is particularly called in the preface. One of these is the *Bechuanaland Exploration Co.* v. *London Trading Bank*, which decided that debentures to bearer issued by a company are negotiable by law merchant. It should be noted that Mr. Simonson calls attention to two points in connection with this case; first that it does not expressly decide whether an instrument under seal *can* become negotiable by law merchant, and that no less an authority than Lord Lindley has expressed a doubt on this. The second point is that this decision only applies to debentures to bearers, although the learned Editor is of opinion that debenture stock certificates to bearer would also be held negotiable if proper evidence of the custom of trade were given. *In re Wrexham Mold and Connah's Quay Railway Co.* disposes of a theory of subrogation based on some expressions used by Fry, L.J., in *Baroness Wenlock* v. *River Dee Co.* An interesting and important subject, well and elaborately treated, is the nature of *perpetual debentures;* and the conclusions arrived at are (1) that they do not infringe the rule against perpetuities; (2) that it is doubtful, whether or not, they would be held to clog the company's equity of redemption; (3) that though it is doubtful, the ordinary trusts in a covering deed are not void as tending to a perpetuity; (4) that the provisions in the Trust Deed must not clog the company's equity of redemption. We also notice a warning as to how the form of debentures to bearer may affect their forming a valid charge on land.

Third Edition. *Concise Precedents under the Companies Acts.* By F. Gore-Browne, M.A., K.C., and Arthur B. Cane, M.A. London: Jordan & Sons. 1903.

It is little more than two years since the last edition of this useful work came out, but during that time the Companies Act 1900 has been passed. This has necessitated numerous "alterations in the notes and disquisitions, but only a comparatively small number of alterations in the forms." As Mr. Gore-Browne says, "the Act bristles with nice questions for discussion," and the learned Authors

deserve the thanks of all their readers for the pains they have taken to advise them as to the probable solution of doubtful points, though on many of them they can only "submit opinions with the greatest diffidence." A good illustration of the number of doubtful points that may arise can be found in the disquisition on "Underwriting." The disquisitions are very clear, and very practical. As a good instance, we may refer to the manner in which the question of "When Dividends may be paid" is treated, and the advice there given as to the course of dealing to be adopted. The arguments against the view taken by so great an authority as Mr. Palmer, on the questions of keeping only a single account, are well worth consideration. The precedents range over the whole life of a company, from its conception to its death, and burial, and are nearly 700 in number. The point raised by Mr. Simonson, and referred to elsewhere, as to the form of debenture to bearer necessary to charge land does not seem to have been adopted. There is an useful set of rules for clubs which, amongst other things, carefully provides against the difficulty which has recently arisen in connection with a well-known London club. We must, in conclusion, call attention to the excellent way the book is got up, and the clearness of even the smallest type.

Third Edition. *The Principles of Equity.* By H. ARTHUR SMITH, M.A., LL.B. London: Stevens & Sons. 1902.

Principles of Equity. By WALTER ASHBURNER, M.A. London: Butterworth & Co. 1902.

Both these treatises on Equity are, we believe, intended primarily for students, but they are both well adapted to lend useful help to practitioners. We noticed that Mr. Theobald said in one of his books not long ago, speaking of the supposed fusion of law and Equity, "that the so-called fusion is no more than a mechanical juxtaposition," and we think that this view would be supported by the sight of these substantial volumes treating on Equity, as far as possible, alone. In fact, Mr. Smith, although he does in one place refer to the fusion having been in a great measure affected by the Judicature Acts, goes on to show for how many purposes—including examination purposes—there is still a distinction. There is no very great difference in the amount of material contained in these two rival volumes, but there is a difference in the arrangement and a somewhat different treatment. The arrangement adopted by Mr.

Smith is based on Storey's sub-divisions of concurrent jurisdiction, and consists of two parts. Part I, where the jurisdiction rests on the distinct substantive principles of Equity; and Part II, where the jurisdiction rests on the distinctive procedure of Equity. As instances it will be seen that in the first part come Trusts, Fraud, Mortgages, and Married Women; and in the second part, Account, Partnership, and Specific Performance. It is fourteen years since the last edition of this work was published, so that much has been done in the way of addition and re-writing to bring it up to date. We notice that the chapter on Partnership has been remodelled and re-written in consequence of the passing of the Partnership Act 1890, on which the new chapter is practically a "commentary." A new chapter has been added on Companies. It gives a concise and clear sketch of Company law, but little more. To deal with such a subject properly would have taken so much space that we doubt whether it was wise to include it at all. But as the question of *ultra vires* is touched upon we think the important case of *In re Wrexham Mold and Connah's Quay Railway Company* should have been referred to. Another slight omission is, that there is no opinion given as to the effect of innocent misrepresentations by infants or married women, a point as to which there seems some doubt.

Mr. Ashburner's principal divisions are Equitable Claims; Equity as aiding the Law; Estoppel; and Equitable Defences. If we had to compare the two books we should say that Mr. Ashburner's is the more historical and analytical, and Mr. Smith's the more practical. The former discusses the principles at greater length, and dissects the judgments more; while the latter gives concisely the result of the cases without so much discussion of them. As good illustrations of Mr. Ashburner's method we might call attention to his discussion of the principle on which is based the jurisdiction to prevent breaches of confidence, where are criticised the judgments of the Lord Chancellor in *Caird* v. *Sime*, and of Bowen, L.J., in *Lamb* v. *Evans*. We do not think that the statement "a limited company may give to its debentures the character of negotiable instruments" quite expresses the state of the law.

Third Edition. *Employers' Liability and Workmen's Compensation.* By T. Beven. London: Waterlow Bros. & Layton. 1902.

Second Edition. *Employers' Liability.* By C. Y. C. Dawbarn, M.A. London: Sweet & Maxwell. 1903.

Mr. Beven points out in his preface that there are very material alterations in this edition. Parts I and II, the first dealing mainly

with the position of the employer and his workmen at Common law, and Negligence; and the second, in form the Act of 1880 annotated, are condensed and altered and brought up to date. But having done this "repulsive kind of literary hack work—the meanest form of book-making, inartistic and chaotic," Mr. Beven has been free to bring forth "what fruits of repentance" he could "by re-writing the whole of what is now Part III—all that treats of the Workmen's Compensation Acts 1897 and 1900." He has had a great mass of new decisions to deal with, and in arranging and extracting the principles (if any) from these, the learned Author displays his well-known learning, ability, and courage. We say *courage* advisedly, for in his preface he scornfully repudiates the theory that a writer on law should not presume to criticise the judges. Criticise he does without fear, and without favour. Such a treatment of such a subject is of the greatest value. Both his summary of the principles of that law of negligence of which he is a past master, in Part I, and his treatment of such difficult subjects as,—What is a *factory*, building exceeding thirty feet in height, *scaffolding*,—are most luminous. He has, however, to sum up the examination of the cases about the meaning of *scaffolding*, by saying, "The outcome of all this seems to be that the Court of Appeal will not disturb the finding of any arbitrator that almost any possible arrangement is a scaffolding. Neither, if *Ferguson* v. *Green* is law, will they disturb any finding of an arbitrator that an arrangement is not a scaffold." Later on he says, "The only comment on the decisions that can be ventured on here is, that certain of them very forcibly illustrate the Lord Chancellor's aphorism that 'the law is not always logical at all.'" The cases as regards what is "serious and wilful misconduct" are not satisfactory owing to the absence of any fixed standard of conduct. Mr. Beven considers this failure to have some standard before the Court will explain decisions otherwise unaccountable. The finding of the County Court judge is in all these instances affirmed, whether imputing serious and wilful misconduct or refusing to do so. Any certainty of decision is thus impossible, depending as the cases do on the fluctuating "views and insight, and possibly prejudices of the County Court bench." There is much else we might refer to if space permitted, but we can only recommend our readers to peruse the learned, but practical treatise for themselves.

Mr. Dawbarn covers the same ground as Mr. Beven, but his arrangement is different. He begins with a good little summary of

the general principle of the liability of employers at Common law. Then comes the Act of 1880 annotated, and followed by a brief summary of the usual defences open to Masters. The text of the Workmen's Compensation Acts is given, and the Author then discusses every point necessary to be proved by the applicant to establish a right under the Act, followed by those points also open to the respondents to be taken by way of answer. The result is an useful and practical work. The only mistake we have noticed is where *Knight* v. *Cubbitt* is cited in support of the statement that the height of the building at the time of the accident is immaterial if it was originally over thirty feet in height. The basis of the judgment is, that it was over thirty feet in height at the time of the accident.

Fifth Edition. *Procedure, Pleading and Practice.* By W. BLAKE ODGERS, M.A., LL.D., K.C. London: Stevens & Sons. 1903.

The A.B.C. Guide to Practice. 1903. By FRANCIS A. STRINGER. London: Sweet & Maxwell.

Third Edition. *Guide to Procedure and Evidence.* By CHARLES THWAITES. London: Furnival Press. 1902.

Although Pleading is no longer the fine art it once was, it is still very important that it should be done properly, and a thorough knowledge of Procedure is indispensable to every practising lawyer. To these we can recommend with confidence the first two books on our list. There is no better book on Pleading than that of Mr. Blake Odgers, perhaps none so good. Without being too lengthy he describes Procedure and Pleading, and the *reasons* for it, in clear and concise language. The understanding of the rules and maxims laid down is much assisted by the well-chosen illustrations given. The practical advice is of great value. Special attention is called to the rules of law by the prominence of the type in which they are printed. The new rules made in 1902 have necessitated considerable alterations in this the fifth edition in eleven years, and there has been added a new chapter on Set-Off and Counterclaim. The only omission we have noticed is that there is no mention of *letters of request*, and probably the reference to *Ginnett* v. *Whittingham* puts the privilege too high as regards Cambridge. And why should it be limited to undergraduates? There is an Appendix of Rules affecting Pleadings, and a long collection of forms. Mr. Stringer's book is a most useful compilation dealing with the practical side of Procedure, and telling as shortly as possible, in dictionary form, the legal

practitioner "clearly and in a few words *how*, *when*, and *where* he may take such step in Procedure as he may decide to take, and to define the mode, time, and place with precision." It contains no cases, few references to statutes, and no rule in full. It is eminently a book to have always at one's elbow, and is marked by Mr. Stringer's usual care and knowledge.

Mr. Thwaites' book is one of his and Mr. Indermaur's well-known series, and marked by the practical sagacity which is a feature of them all. It contains advice on reading, a sketch of Practice in the King's Bench Division, test questions on Indermaur's *Manual of Practice*, digest of questions and answers. On evidence there are similarly test questions on Stephens' *Digest of Evidence*; and questions and answers on Evidence. The ground is well covered, and the answers, as far as we have been able to examine them, are correct and well expressed. The book is admirably adapted for examination purposes.

Sixth Edition. *Emden's Winding up of Companies and Reconstruction.* By H. JOHNSTON. London: William Clowes & Sons. 1902.

In this edition Mr. Johnston has, at the suggestion of Judge Emden, reverted to the form of the earlier editions, and treated the whole subject in chapters, and not mainly as an annotated edition of the Act and Rules of 1890. We quite agree that the result is to make the subject of winding up "easier both for lawyers and laymen, and particularly for students." There has also been a marked alteration in treatment, with the very laudable object of reducing the size of the book. This has been largely brought about, in the words of the learned Editor, "by recasting the material so as to state as far as is possible the principle to be extracted from, rather than the actual decision in, the cases cited." This, it is obvious, involves very great labour, and still greater care; otherwise in dealing with such a subject as winding up the result would be most disastrous. The work has been very carefully executed, and the result is a most useful guide to a very complicated subject. As instances of the difficulties of the subject, we may refer to the Editor's submission that there is nothing in the recent cases to justify the view of a very learned judge that the *ejusdem generis* rule has been relaxed; his support of *Re Powell* in spite of adverse criticisms; and his dissent with the decision in *Re Charterland Stores.* A profitable subject of discussion is raised by the inquiry whether a person publicly examined is entitled to refuse to answer questions that may criminate

him. There is an useful summary of cases as to actions for fraudulent misrepresentations by directors etc. of companies, decided before the Director's Liability Act 1890. The index does not seem quite as carefully done as the rest of the book, as we have noticed two or three errors. A reference to prosecution of misfeasant directors is given as page 495 instead of 492, and there is a reference, under the heading *perjury*, to page 496, which we have been unable to account for.

Sixth Edition. *The Law of the Constitution.* By A. V. Dicey, K.C., B.C.L. London: Macmillan & Co. 1902.

The great value of this work is well known and a new edition is always welcome, as there is certain to be some mature reconsideration of previous positions, or some further enrichment by notes. The first addition that we expect to find is an account of the new Australian Commonwealth, and we are not disappointed; we find various allusions to it in the chapter on Non-Sovereign Law-making Bodies, and it has a new Note in the Appendix devoted to it. This is Note IX, and under the title "Australian Federalism" the main characteristics of the Commonwealth are carefully discussed. It is also considered in Note II, "Division of Powers in Federal States." There are considerable modifications in Chapter VII, "The Right of Public Meeting," and the supplemental Note V. The tendency of modern opinion seems rather to admit a wider power of the Executive to restrain the right of a meeting lawful in itself, if it is likely to lead to a breach of the peace. Some of the cases decided since the last edition, especially *Wise* v. *Dunning*, *Humphries* v. *Connor*, and *Reg.* v. *Justices of Londonderry*, rather point in this direction. In deference, we believe, to the opinions of some distinguished French lawyers, Chapter XII, on "*Droit Administratif*," has been somewhat modified, and two new notes of great interest have been added; Note X is on English Misconceptions as to "*Droit Administratif*," and it is pointed out that there are two main mistakes that an English student is apt to fall into: (1) the assumption that *droit administratif* must correspond with some branch of the law of England; (2) that *droit administratif* is not *law* at all, "but is a mere name for maxims which guide the Executive in the exercise, if not of arbitrary, yet of discretionary power." An interesting point raised and answered in the negative in the same note is, "Has *droit administratif* been of recent years introduced in any sense into the law of England?" Note XI is on

the Evolution of *Droit Administratif*, by which it has during the last century been brought much nearer to the sense which we attach to the term law. The only other new Note (XII) is an important one on Martial law in England during the time of war or insurrection. It is one of considerable length and well repays careful perusal. It is based on the doctrine of "immediate necessity," and Professor Dicey upholds it against three other doctrines, which he terms respectively,—the doctrine of the Prerogative; the doctrine of Immunity; and the doctrine of Political Expediency. It may be noticed that this last is the doctrine supported by Sir Frederick Pollock. We should like to have had the important question of the right to refuse or expel aliens fully discussed. There is a funny little misprint repeated from the last edition, "*vindices injuriam.*"

Tenth Edition. *Addison's Law of Contracts.* By A. P. P. KEEP, M.A., and W. E. GORDON, M.A. London: Stevens & Sons. 1903.

The learned Editors have accomplished a great feat in bringing out this new edition without an increase of bulk. In the eleven years which have elapsed since the last edition was issued "a large number of statutes have been passed, and nearly a thousand new cases bearing on the subject of Contracts have been decided." To fit these into their proper places is work enough, but to decide what to leave out to make room for them requires all the skill and experience of an Editor. As far as we can judge this has been satisfactorily done; we miss a case here and there, but it seems inevitable, without an increase in the size of the book—already no light weight—to an unwieldy extent. As the learned Editors state in their preface, the passing of the Sale of Goods Act 1893 has necessitated the re-writing and re-arrangement of the chapter on Sale of Goods. That alone is more than one hundred pages. We turned with some interest to see in what compass the Workmen's Compensation Acts had been condensed, and found that it took up about a page and a quarter; but only because the learned Editors consider it will come in more properly in the next edition of *Addison on Torts.* In reading the chapter on "Master and Servant" we came across an opinion which, if correct, would be very valuable to most masters of households. This is, "it is apprehended that the entertaining of guests at the master's expense, without his knowledge and without any express or implied permission so to do, would be a good ground of dismissal." But for this no authority is cited, and we think it would be a good

deal a question of degree, as a cook having her mother to tea would scarcely justify such a step. We should have liked to have found a discussion on *Krell* v. *Henry* and the other Coronation Seats cases, but they were not reported, even if decided, when this work went to press. We may call attention to the fact that a chapter of over forty pages is devoted to the dry but important subject of Stamps.

Fifteenth Edition. *Paterson's Licensing Acts.* By W. W. MACKENZIE, M.A. London: Butterworth & Co. 1903.

We noticed the fourteenth edition of this well-known work in our last number, but are glad to see that its success was so great that the whole of that edition has already been exhausted. We have little doubt that the same fate will soon befall the present edition; the more especially as it has the additional advantage of further consideration, and the revision and re-writing of many of the notes to the Licensing Act, 1902.

Thirty-fifth Edition. *Stone's Justices' Manual.* Edited by J. R. ROBERTS. London: Butterworth & Co. 1903.

The most important addition to the Editor's labours this year was the necessity of considering the Licensing Act 1902. His opinion of it may be gathered from the preface, where, though he describes it as a "well-meant attempt," he considers that "following a long list of complex statutes, it materially increases the difficulty of interpreting them, and emphasizes the need for their codification." Particular attention is paid to the Act, as references are not given to its various provisions in the proper places among the Intoxicating Liquor Laws; but the Act is printed in full in the Appendix, where also is given a very useful schedule of notices required under the various Licensing Acts. We notice that Mr. Roberts inclines to the opinion that the expression "members" in sect. 28 (1) (g) does not include "temporary" or "honorary" members. We know this is the view held by many learned lawyers, but it seems to us to neutralize to a considerable extent one of the main objects of the Act. Nearly 120 new cases decided by the Superior Courts have had to be considered, and it is pointed out with just pride that the case of *Igoe* v. *Shann*, the decision in which was questioned in the last edition, has been reversed by the Court of Appeal. The value of such a well-established work requires no confirmation by us.

Fortieth Edition. *Every Man's Own Lawyer.* By a Barrister. London: Crosby Lockwood & Son. 1903.

This edition adds the following Acts passed in 1902: Licensing Act; Shop Club Act; Cremation Act; and Midwives; some of 1901 and some of 1900, the most important of which latter date is the Companies Act. The summaries of these are carefully done. It is worth noticing that there is a précis of the Education Act 1902 although the Bill had not passed into law at the time of going to press. We notice some little mistakes and deficiencies. Our old friend, the appointment of a Clerk of the Peace, is not quite right yet. There is no mention of the power of the High Court to grant bail, and there is a bad slip in the description of the punishment that can be awarded under sections 4 and 6 of the Criminal Law Amendment Act.

CONTEMPORARY FOREIGN LITERATURE.

L'Istituto Famigliare nelle Società Primordiali. By GIOVANNI AMADORI-VIRGILJ. Bari, 1903.

This volume, printed in good type and with an artistic cover, is an excellent example of Italian provincial work. In addition, the contents are most interesting. The author has made good use of his predecessors, and knows the English authorities as well as the treatises of Bachofen, Westermarck, Kovalevski, and other writers on the subject, especially Posada, whose valuable work, *Teorias Modernas acerca del Origen de la Familia,* dates from 1892. The main argument of Signor G. Amadori-Virgilj is that there are two co-existent theories in early society, the supremacy of the father in political matters, the tracing of relationship through the mother. Gradually the former theory supersedes the latter, the point of contact being probably found in the strange institution of the *couvade*, by which, where it exists, the father publicly assumes his place as a physical cause of the family.

PERIODICALS.

Journal du Droit International Privé. Nos. XI, XII, 1902; I, II, 1903. Paris.

A good deal of matter interesting to English lawyers is to be found in these numbers. They contain articles on the English law

of associations existing not for purposes of profit, chiefly trades unions and clubs (p. 5), on martial and military law in England (p. 104), and on irregular marriages in Scotland (p. 988). Among the more important decisions may be mentioned that on p. 1044 as to the application of the Married Women's Property Act, 1882, by a French Court to an Englishwoman domiciled in France, and that on p. 202, the decision of the Circuit Court in Louisiana in the cases of *The Anglo-Australian* and *The Monterey*, discharging a rule nisi for an injunction to restrain the shipping of mules from New Orleans to be used for military purposes in South Africa. At p. 200 is a neat little case from Brussels, deciding that the word "barratry" occurring in an English charter-party must bear the English and not the broader French meaning. The 1902 number contains the usual valuable bibliography of the year's publications.

La Giustizia Penale. 7 Jan.—25 March, 1903. Rome.

Several interesting decisions may be noted, especially some on points which could not arise in an English tribunal. Such is the decision at p. 13 that a railway official on a State railway is not a person *rivestita di pubbliche funzioni.* So too that at p. 168, where it was held that a prosecutor who constituted himself *parte civile* during the hearing of the case and after hearing the witnesses withdrew before acquittal of the accused, was liable for damages and costs. There is an interesting case at p. 368, in which it was held on cassation from Messina that to send a telegram in the name of another person without bona fides is *falso in scrittura privata.*

JAMES WILLIAMS.

WORKS OF REFERENCE.

Debrett's House of Commons and the Judicial Bench, 1903. London: Dean & Son. This work forms a complete Parliamentary Guide, containing as it does not only notices of Members of the House of Commons and Judicial Bench, but also an abridged Peerage, and much other matter useful alike to the politician and the lawyer. The many alterations rendered necessary by the large number of Coronation honours bestowed in June last have all been noted, and the contents revised down to date. The biographical notices of Members of Parliament and Judges are illustrated with armorial bearings.

The Literary Year Book and Bookman's Directory, 1903. London: George Allen. Although this work has only reached its seventh year, it has already made an exceedingly strong position for itself, and this is scarcely to be wondered at, seeing that the contents must be found extremely useful by all those who are in any way connected with literature. The Editor of the present volume, Mr. Henry Gilbert, points out that in preparing this edition his endeavour has been rather to continue and extend the features already inaugurated than to introduce new sections, and, looking to the fact that no section at present included in the work is superfluous, we think Mr. Gilbert does well not to add any new features, as this would perhaps tend to render unwieldy what is at present an extremely handy work of reference.

Other books and publications received:—Barham's *Student's Text-book of Roman Law*; Nicolas' *Formation of Companies*; Barlow and Macan's *Education Act, 1902*; *Questions of English Divorce* (Grant Richards); Roscoe's *Admiralty Practice*; Roby's *Private Roman Law*; Hart's *Law of Auctioneers*; Lely's *Annual Statutes, 1902*; Mews' *Annual Digest, 1902*; Beal's *Yearly Digest, 1902*; Mather's *Sheriff and Execution Law*; Rawlinson and Johnston's *Municipal Corporation Act*; Rawlins' *Specific Performance of Contracts*; Wright's *Estates Gazette Digest of Cases*; Moore's *History of the Law of Fisheries*; Scrutton's *Law of Copyright*; Richards and Lynn's *Education Acts, 1870–1902*; Oke's *Handy Book of Fishery Laws*; Will's *Electric Lighting, etc.*; Paterson's *Practical Statutes, 1902*; Jelf and McBarnet's *Some London Institutions, etc.*: *Reports of the High Court of the South African Republic, 1894*; Reeson's *Metropolis Water Act*; Bartley's *Metropolis Water Act*; Clegg and Robertson's *Digest of Cases under Workmen's Compensation Acts*; Brodie-Innes' *Comparative Principles of the Laws of England and Scotland*; Lisle's *Encyclopædia of Accounting, Vol. I*; *English Reports, Vol. XXVI*; *Public Provisions of the Metropolis Water Act, 1902*, by J. Reeson; *The Professional Criminal in England*, by the Revd. W. D. Morrison, LL.D.; *Natal Law Quarterly, Index to Vol. I*; *The Humane Review*; *The Northern Securities Cases*, by Carman F. Randolph; *Journal of Comparative Legislation*; *Canada Law Review*; *Compensation in Licensing*, by Sir Ralph Littler; *New York State Library, Bulletin No. 79*; *Report of American Bar Association, 1902.*

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews, Juridical Review, Public Opinion, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Speaker, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Virginia Law Register, Albany Law Journal, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Westminster Review, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer* (India), *South African Law Journal, Columbia Law Review, Japan Register.*

THE

LAW MAGAZINE AND REVIEW.

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I.—A GENERAL SCHOOL OF LAW.

TOUT *vient à point à qui sait attendre.* Those who, like the present writer, have been long insisting that Legal Education in England should be raised to a higher plane, have now a prospect of seeing their ideals realized. Occasions there are when money is more powerful than argument, and the money that was wanted is at last forthcoming. It has reached us from an unexpected source—from the sale of the sites of a couple of those ancient nurseries, or preparatory schools, of law, formerly known as "Inns of Chancery."

Many have been of late years the structural changes in London, and these have brought other changes in their train. Clifford's Inn, an appanage of the Inner Temple, New Inn, an appanage of the Middle Temple, have disappeared one by one. They have shared the fate of Clement's Inn and Furnivall's Inn, of Barnard's Inn and Staple's Inn, overthrown by the advancing wave of Metropolitan betterment. Even the memories of these picturesque hostelries are fast fading away. Two only have been rescued from oblivion, and bid fair to "blossom in the dust." In the action of *Smith* v. *Kerr*, decided last year, the Chancery Division of the High Court directed Clifford's Inn to be sold, and impressed with a charitable trust £45,000 of the

purchase-money. Another order, made about the same time in *Attorney-General* v. *Coldham*, impressed with a similar trust £55,000 of the purchase-money of New Inn. These amounts, making a total of £100,000, now fall to be dealt with by a "charitable scheme," and are to be devoted to legal education in some shape at present undetermined.

As soon as the news of this lucky windfall got abroad, numerous claimants presented themselves. The Council of Legal Education, the University of London, the great colleges of Manchester, Liverpool, and Leeds, with many others, sought to participate in the fund. If all had been listened to, the fund would have been frittered away without producing any particular effect beyond arousing jealousies and causing disappointments. Sir Robert Finlay, with laudable insight, took a broader view of the position. He considered that an opportunity had arisen for establishing in London a great School of Law, under Charter or Act of Parliament, in which provision should be made for the systematic and scientific teaching of all those branches of jurisprudence which are administered throughout the British Empire. The note he thus sounded was an Imperial note, in keeping with the spirit of the time. It was, moreover, a true note, for it echoed the general opinion that there are in our educational system sundry weak places which call for instant therapeutic treatment.

A few years ago I sketched in this *Review* the system of legal education then in force in Germany, France, Belgium, and the United States, and showed how in some respects they were superior to our own. But in all practical matters, from politics to poultry-rearing, one has to be something of an opportunist. Whilst continuing to look at the question from the standpoint of one who desires that the reputation of his country for learning should not fall behind that of any other nation, I shall here deal with the subject on fresh lines and endeavour to put new life into it. Indeed

the main aim of my former paper will not serve to-day. I there urged the establishment of a Faculty of Law in connection with a Teaching University, that seeming then to be the only way of compassing the end in view. The Teaching University is, however, now in existence, and of a Faculty of Law, as a living organic part of it, there is no immediate prospect. Yet the situation has been saved by the acquisition of this £100,000. It has rendered practicable a Central Law School of the Empire, independent, indeed, for the moment of that University, but capable of being affiliated to it hereafter, if that should be thought desirable.

The conception of a Metropolitan School of Law is not a novel one. In the sixteenth century, Lord Keeper Bacon, sometime Treasurer of Gray's Inn and father of the illustrious Francis Bacon, drafted, in conjunction with two of his friends, a scheme for a central school "where young men of good family might be taught Law" and kindred subjects. The endowment was to be provided out of the confiscated revenues of the dissolved monasteries. The project fell through because the proceeds of these monasteries were distributed amongst the favourites of the Crown, the Lord Keeper himself sharing in the spoil. But Sir Nicholas Bacon's idea was not extinguished, and was destined to be revived in other forms later on.

In 1846, a Select Committee of the House of Commons declared that a proper system of legal education ought to be provided to meet not only the wants of the professional, but also of the unprofessional, student, and that the four Inns of Court should form an aggregate of Colleges or Law University. A like suggestion was made by a Royal Commission appointed in 1855. This Commission was composed of the most eminent lawyers of the day, amongst them being Sir W. P. Wood (Lord Hatherley), Sir Alexander Cockburn (Lord Chief Justice), and Sir Richard

Bethell (Lord Westbury). In 1862, Lord Cairns induced the Benchers of Lincoln's Inn to pass a resolution to the effect "that in their opinion the Constitution of a legal "University, to which the various Inns of Court might be "affiliated was desirable." In 1868, Mr. W. J. Jevons, a solicitor of Liverpool, in a paper which he read at Leeds before the Conference of Provincial Law Societies, proposed that there should be established a "General school of law" to be maintained out of the revenues of the Inns of Court and such of the Inns of Chancery as were then subsisting.

In 1870, the "Legal Education Association" was formed in London to carry out Mr. Jevons' proposal. In 1872, Sir Roundell Palmer, President of the Association, moved in the House of Commons that "a General School of Law should be established in the Metropolis, by public authority, for the instruction of Students intending to practise in any branch of the legal profession and of all other subjects of Her Majesty who might desire to resort thereto." Mr. Gladstone, then Prime Minister, in the course of a sympathetic speech, suggested that it would be better to proceed by Bill than by Resolution. A division was called for, and the motion was lost. Not long after, Sir R. Palmer, who had now become Lord Chancellor, introduced a bill in the House of Lords to the same effect as his resolution. It was vigorously opposed by the Inns of Court, who petitioned Parliament against it. It passed the Second Reading in 1877, reached the Report stage, and was not further proceeded with.

Such is, in brief, the history of the proposal recently put forward by Sir R. Finlay in Mr. Justice Farwell's Court. The judge characterized it as "magnificent." Some will doubtless pronounce it to be a vain illusion—one of those utopias which are pleasant to dream of but are unsuited to a practical age. In order to discover on which side the truth lies, we must shortly consider the kind of education

at present furnished by the four Inns of Court, and the Law Society respectively.

The educational work of the Inns is, as is well known, now performed not, as formerly, by the Inns separately but by a joint Council to which each Inn contributes its quota of members. This Council came into being as the result of the Report of the Select Committee of 1846 already referred to. It originally consisted of eight members (two from each Inn), and in that form held its first meeting in 1852. Its main function was, and still is, to settle schemes of lectures and classes which shall be open to the members of all the Inns on payment of a small fee. The number of the Council was enlarged several years ago from eight to twenty (five from each Inn). In addition to the lectures and classes, the Council conducts examinations for calls to the Bar. These examinations were rendered compulsory in 1872.

The present Council is composed as follows:—Its chairman is a Lord of Appeal, its vice-chairman an eminent K.C., who seems by the way to be somewhat of a pluralist, since he is also chairman of the General Council of the Bar and of the Council of Law Reporting. The other members are two Lords Justices; four Judges of the King's Bench Division; one County Court Judge; one Master in Lunacy; the Common Serjeant of London; and nine practising barristers. Admirable men in point of status and attainments, but all deeply immersed in professional occupations.

The "Board of Studies" is composed of the same material as the Council, and consists at the present moment of nine persons, of whom four fill a judicial position; two are practising K.C.'s; and the remaining three belong to the Teaching Staff. The Council can only meet when the Courts have risen for the day, that is to say, at a time when most of its members are fairly exhausted by their professional labours. The powers of initiative possessed

by a judge or a practising lawyer are never at their best after the clock has struck four.

Few changes have been made during the last thirty years. In the winter of 1895, "occasional" evening lectures were set on foot and thrown open to the public; the lecturers invited being distinguished men unconnected with the Council of Legal Education, and each having special knowledge of the subject with which he was asked to deal. These evening lectures have proved a great success. In 1896, the public were admitted to all the lectures and classes without exception on payment of a moderate fee. The average yearly number of outsiders who attend the lectures and classes is thirty-four in all, of whom eleven are articled clerks. Since the number of such clerks in London last year was 217, it follows that only about 5 per cent. avail themselves of the opportunity so offered them.

Let us now turn for a moment to legal education as conducted under the auspices of the Law Society. I have said that the young solicitor was originally taught at an Inn of Chancery, but this teaching gradually fell into disuse for reasons which have been fully and clearly explained by Mr. Justice Walton.[1] To what has been said by that learned Judge I will only add that, in 1825, a marked revival of learning took place amongst what I may call, without risk of giving offence, the second branch of the profession. In that year, a few leading solicitors in London set on foot a Society the objects of which were: (1) to keep watch and ward over practitioners in their relations to their clients; (2) to secure for the benefit of law students courses of lectures and free access to a legal library. In 1828, this energetic little band of reformers purchased a convenient site in Chancery Lane and erected on it a building known as the "Law Institution." In 1822, their labours were recognized by a Royal Charter which entrusted to a few

[1] *Law Magazine*, Nov., 1899; Feb. and Aug., 1900.

persons, who formed the first Council of the Society, the superintendence of the legal education of articled clerks, subject to rules to be made by the Judges, who were appointed to be the examiners. In 1877, the duty of examining was transferred to the Council of the Society, assisted by one of the Masters of the Queen's Bench Division.

From 1836 to 1892 oral lectures were given at the Law Institution, the lecturers being usually barristers. During part of the same period classes were also held there at which the subjects of the lectures were informally discussed. To candidates for the Intermediate Examination instruction was imparted by "Readers," who were usually solicitors.

In 1892, the number attending the lectures and classes had become so small that the Council decided to discontinue both. It was found that the law clerks were in the habit of resorting to private "coaches" in spite of the high fees they had to pay, and that these "coaches" were able to checkmate the examiners by giving valuable "tips" for the questions likely to be set, thus reducing the students' exertions to a minimum. The Council thereupon altered their tactics, and devised a new system with the object of checkmating the "coaches." The system of lectures by barristers had been intermittent, operating only during comparatively short periods of the year. The Council now replaced it by a system of classes, conducted exclusively by solicitors, but operating pretty continuously throughout the year. They also made another change for the convenience of clerks serving their articles in the Provinces. For these absentees, they started "teaching by correspondence," that is to say, the tutor, on the application of any such clerk, would tell the applicant that he must begin with a certain law book—usually *Stephen's Commentaries*—read a certain portion of that book—correspond with the tutor on such

points as presented a difficulty—and answer on paper such questions as the tutor might transmit to him for the purpose of testing his progress.[1]

So things went on until the present year, when the Council of the Law Society, becoming dissatisfied with the tutorial system, decided to abandon it. Before the Attorney-General ventilated his scheme they had already determined that their teaching should embrace studies of a much higher character, and should be conducted by teachers of a very different stamp from the ordinary private "coaches." They had resolved to bring the students under the general superintendence of a Principal, who should be accessible to students on specified days and hours in order to advise them as to courses of reading, lectures and classes to be attended, books to be selected, and so forth. They had further resolved to appoint Readers to give lectures and hold classes under the general direction of the Principal, and to give occasional lectures on special subjects. This programme will probably be modified if a General School of Law is established.

With these data before us, we are in a position to judge whether Legal Education, as conducted in London, is satisfactory or not. It is impossible to think that it is. It appears to me that what Lord Selborne said many years ago is as true now as then: "Practically we have "no great Law School in England at all, although such "institutions have long existed on the Continent and "have been found eminently successful." The prospectus issued by the Council of Legal Education exhibits on its face the defect of the teaching of the Inns. The strictly professional part, indeed, is excellent. The Readers and Assistant Readers, as they are called in remembrance of the olden time, do their work with great thoroughness,

[1] See the evidence of Mr. R. Pennington before the Gresham Commission. —*Minutes*, pp. 671, *et seq.*

but—by no fault of the Council whose hands are completely tied—the non-professional part of the programme is meagre and insufficient in the extreme. What must the intelligent foreigner think of us when he learns that "Roman Law, Jurisprudence and International Law (public and private)" are all lumped together as one subject and entrusted wholly to the charge of two individuals, and that "Constitutional Law, English and Colonial, and Legal History" are entrusted to only one? Yet the subjects just named are precisely those which can with most profit be orally discussed, because they are not easily expounded in text books. With professional law, as practised in our Courts to-day, the contrary holds good. Here standard text books abound, affording all necessary information. It is not too much to say that a careful perusal of one of these text books, under the guidance of some competent friend, is worth nearly all the legal lectures in the world; whilst, working for a year in the chambers or office of a practitioner—provided he has leisure to look after his pupils—is worth all the classes in the world.

It must be borne in mind that there are two aspects of Law. In its wider acceptation, Law is a science founded on the same principles as other sciences. It is a philosophy of right and wrong applied to the practical phenomena of life. As such, it is not a purely empirical system; still less is it a mere set of rules evolved from the investigation of a number of decided cases. It is not concerned with one country only; it demands an acquaintance with the legal systems of many countries and more particularly with the various systems to be found in various parts of the Empire. It demands further an acquaintance with International law and the history of International arbitration. It stands on the borderland of Ethics, Logic, and Economics and should be studied in connection with these.

With this kind of law experts of the professorial type are

best fitted to deal. The other kind of law, the strictly professional kind, is best dealt with by men who are in touch with the current decisions of the Courts. The Council of Legal Education is, as already shown, made up of judges and practising barristers, to the exclusion of all outsiders. Its members, however eminent in their way, are not competent, even if they had the authority, to undertake the superintendence of instruction in departments of learning with which they are unfamiliar. What is wanted, then, is the infusion of fresh blood, and there should be no limitation of the source from which the fresh blood is taken.[1]

In Baltimore, U.S., the distinction between the professional and non-professional departments of law is so clearly recognized that the two are studied in separate institutions —the former at the University of Maryland, which confers on its *alumni* the degree of Bachelor of Laws; the latter at the Johns Hopkins University, which confers the degree of Doctor of Philosophy. This separation is not necessary, nor, in my opinion, desirable, since principles and practice do and should act and react on each other. But in England, unfortunately, we fail to give due weight to principles. Part of our professional law is still an undigested mass, resting on another mass of heterogeneous cases, and the condition of our Statute Book is still worse.

It has been announced very recently that, thanks mainly to the munificence of a firm of German financiers who have enriched themselves in South Africa, we are to have a Charlottenburg in London for the application of science to industry. Why not set up in our midst the equivalent of a Johns Hopkins University for the application of science to law? It would be little short of a national disgrace if a similar institution were established in one of our Colonies before it had been started at home.

[1] I have already expressed a similar opinion in the *Nineteenth Century* for November, 1892, "The Inns of Court as Schools of Law."

The new School of Law, when formed, must of course have permanent and dignified quarters. It must not, as does the system under the Council of Legal Education, reside in lodgings in one of the Inns of Court. It should, however, be in close proximity to those Inns whose splendid libraries should be open to its students. Dignified the home of the new School should certainly be, since as Lord Sherbrooke (once Mr. Robert Lowe) said, "it should be made attractive to all who desire to qualify themselves for public employment, for the work of legislation in Parliament, or for the unpaid Magistracy."

In this School the barrister and the solicitor should, as in Scotland, be trained to a great extent side by side. I do not mean that when we come to test qualifications to practise, the same examination should be held for both. Far from it. Those who have the power of calling to the Bar should examine the candidates in such subjects as they may from time to time determine, and those who are authorized to test the fitness of candidates to be admitted as solicitors should do the like by them.

The Committee of the four Inns recently appointed, in furtherance of the Attorney-General's plan, to prepare a scheme of their own devising, appear by the Report on which they have agreed to be not unwilling to fall into line with the new idea. They begin, as was to be expected, by insisting that the control of the Inns over the admission of students, and over their qualification for call, shall remain intact. They affirm it to be essential to the success of any scheme of legal education that there should be provided lecture-rooms, class-rooms, studies, and appropriate students' libraries—all, if possible, under one roof; and that the head of the establishment should be a Principal charged with the superintendence, under the direction of the prescribed educational authority (whatever that authority may be), of the administration of such scheme of education as may for the time be in force.

The Committee recommend that the Inns of Court petition for a Charter incorporating the educational authority; that the co-operation of the Law Society be invited; that the Charter be granted to persons nominated by the Inns and the Law Society; that the Inns contribute annually to the work of the educational authority; and that the funds derived from the sale of Clifford's Inn and New Inn be devoted to the purposes of such authority either as an endowment or to provide buildings.

With regard to the constitution of the Governing Body of the new School—perhaps the most important point of all—the Committee propose that it shall consist of twenty-eight members; four to be appointed by each Inn, four by the Law Society—a number certainly none too large when it is borne in mind that it was mainly by the exertions of that Society that the New Inn fund was recovered—one each by the Universities of Oxford, Cambridge, and London; one each by the Lord Chancellor, the Foreign Secretary, the Colonial Secretary, and the Secretary for India; and one (the Principal) by the Governing Body. The Report has been adopted by Lincoln's Inn, the Middle Temple, and Gray's Inn. The adhesion of the Inner Temple, the only hesitant, will, it is hoped, be obtained before long.

How far this scheme will commend itself to the Attorney-General and the Court, we do not of course know, but that the Inns should have gone so far as to contemplate their own even partial supersession is not a little remarkable. This fact does, indeed, render appropriate the French adage quoted in my opening sentence. It also brings back to us the aspiration to which Lord Russell of Killowen gave eloquent utterance in the address he delivered in Lincoln's Inn Hall in October, 1895:—

"We are here," he said, "at the very heart of things, where the pulse of dominion beats strongest, with a population larger than that of many kingdoms—a great centre of commerce, of art and of literature, with countless libraries, the rich depository of ancient records, and the seat at once of the higher judiciary of Parliament and of the Sovereign. From this point is governed the greatest

empire the world has known. From our midst go forth to the uttermost ends of the earth not merely those who symbolise the majesty of Power, but happily with them, those who represent the majesty of Law—Law, without which Power is but tyranny.

"In parts of Canada, French law, older than the First Empire, modified by modern codification, prevails—in other parts, the English system; in Australia, English law modified by home legislation in those self-governing communities; in parts of Africa, Roman law with Dutch modifications; in the West Indian Colonies, Spanish law modified by local customs; In India, now the Hindoo, now the Mahommedan law, tempered by local custom and by local and Imperial legislation.

"If the empire of our arms is wide, so happily is the empire of our Law. Is it an idle dream to hope that, even in our day and genenenration, there may here arise a great School of Law worthy of our time—worthy of one of the first and noblest of human sciences, to which, attracted by the fame of its teaching, students from all parts of the world may flock, and from which shall go forth men to practise, to teach and to administer the law with a true and high ideal of the dignity of their mission?"

It is an open secret that, in reference to the formation of such a School of Law as the late Lord Chief Justice foreshadowed in the above passage, the authorities of the University of London have been for a long time engaged in collecting information, with the help of legal experts from the Continent and the United States, and that the legal members of the Senate have made a report thereon, which is now under the consideration of the Academic Council of the University. That Council has not yet come to any final decision, but there can be little doubt that if the new School should embrace the wider field of jurisprudence, and not confine itself to teaching strictly professional law, the University would accord to it a hearty welcome.

Those, then, who are responsible for the present movement have two alternatives before them. Either they must aim at a strictly professional school, or at a school which shall be both academic and professional. In the former case, they *must* work wholly independently of the University of London; in the latter case they *may* work with that University, and become, like it, both Imperial and Local. The ultimate decision, whichever way it goes, will be attended with important consequences. Many await it with no little interest.

MONTAGUE CRACKANTHORPE.

II.—SPECIFIC PERFORMANCE.[1]

IT is rather remarkable, when one comes to think of it, that in this highly civilized and Christianized country, and in this enlightened twentieth century, the topic of the Specific Performance of Contracts should afford materials enough for one of this Association's Lectures, that a text-book of upwards of 800 pages should have been devoted to the elucidation of that topic, and that, year in and year out, there should seldom be a month without some case, illustrating or connected with that topic, appearing in the monthly issue of the *Law Reports.*

For what is the specific performance of a contract? Simply this: the doing by each of the parties to the contract of the very thing or things which he contracted to do, with the result that each party gets—and gets *in specie*—what he in and by the contract bargained for.

Now, that is just what everybody—assuming "everybody" to be an honest man, as I suppose one ought to assume, where one knows nothing to the contrary—intends and contemplates when he enters into a contract: and further, it is just what ought, on elementary principles of honesty, fair dealing, and straightness between man and man, to be the consequence and outcome of every contract; provided, of course, that the actual performance of the contract in accordance with its terms is neither impossible nor illegal. And, that being so, one might perhaps *a priori* expect that, in the event of a party to a contract refusing or neglecting to perform his part of it, the tribunals of a civilized and moral country like England would always, at the instance of the other party, compel the defaulter literally to fulfil his promise, or (in more technical language) would specifically enforce, or enforce specific performance

[1] A Lecture delivered before the Solicitors' Managing Clerks' Association.

of the contract, whatever kind of contract it might be, whatever its subject-matter or its objects, in the absence of any difficulty or objection on the score of impossibility or illegality, or (one ought perhaps to add) of any circumstance rendering such performance unnecessary, unreasonable, or clearly inexpedient.

But, here in England at all events, anyone who expected to find the Courts administering the kind of ideal justice which I have just indicated would be disappointed.

There are certain classes of contracts which our Courts are prepared to enforce specifically; but there are other and large classes of contracts, for breach of which they will grant no other remedy than money damages.

I shall have something to say presently about the distinctions between these different classes; but before going to that, I want to disabuse your minds of what I believe to be a not uncommon error—I own to having in the past fallen into it myself—the notion, I mean, that there is something peculiarly, if not exclusively, English about the remedy of specific performance; that, in introducing and (though only in certain cases) granting that remedy, English Courts of Equity achieved an approximation to ideal justice unattempted by other civilised systems of jurisprudence.

Without pretending to familiarity with foreign laws, I can give you at least three instances of systems, outside that of this country, in which the specific performance of contracts is a recognised form of remedy.

First—to go no further afield than Scotland. In accordance with a pleasant way they have there in the matter of legal phraseology, the Scottish Courts do not use the English expression "specific performance;" but specific "implement"—as they call it—(meaning the same thing) is with them, not, as with us, a so-called "extraordinary" remedy, but one of the ordinary remedies to which a party to a contract for sale (say) of a landed estate is entitled

when the other party refuses to perform his obligations under the contract. In other words, specific performance is part of the ordinary jurisdiction of the Courts of Scotland.[1]

Then, in Germany, the specific performance of contracts is enforced by the Courts much more extensively than in this country. Instances have been found of specific performance actions in Germany as early as the thirteenth century; and, if I am rightly informed, under the present German Code of Civil Procedure the Courts which administer that code are in the habit of enforcing contracts specifically in the great majority of cases.

The Roman-Dutch law, again, in cases of contract enforces, and that by means of imprisonment, the specific performance of a defaulting party's obligations.[2]

Even in cases of breach of promise of marriage the unwilling party has, under Roman-Dutch law, been judicially compellable to enter into the marriage; and there is a reported instance in which, in the year 1832, the Supreme Court of the Cape Colony—where Roman-Dutch law generally prevails—decreed that a recusant defendant, who had promised marriage to the plaintiff, should marry her openly in church *(in facie ecclesiæ)*. Similar orders, I may mention, were formerly made in England by the Ecclesiastical Courts: but their jurisdiction in that respect was finally abolished in the reign of George the Fourth by the Marriage Act of 1823. It was, however, not until the year 1838 that the right of action for specific performance of a promise to marry was abrogated in the Cape Colony by Order in Council; and in the Transvaal it continued to exist until an Ordinance abolished it in the year 1871.

To what I have already said about German law it may here be added, that in some German States orders may,

[1] *Stewart* v. *Kennedy* (15 App. Cas., at pp. 95, 102, 105).
[2] See Kotze's *Van Leeuwen*, Vol. 2, pp. 27, 118, 210.

even at the present day, be obtained for specific performance of a promise to marry, but such orders are not really effective; for they are not enforceable by any form of personal compulsion, and, if disobeyed, merely create a claim for damages. How far, in France, the enforcement of specific performance of contracts can be obtained from the Courts is a doubtful and disputed question. This much seems clear: first, that the French Civil Code, by its provisions for judicially putting a purchaser of land under a contract of sale (which in that country operates as a conveyance) in actual possession of the purchased property, certainly does in a sense provide for, or promote, the specific execution of such contracts; and, secondly, that the French Courts have a way of indirectly compelling specific performances by imposing on a recusant party what are called "moratary" damages, *i.e.*, damages fixed at a certain—and sometimes quite arbitrary—rate per day, for every day's delay in the specific execution of the contract.

Returning home, now, from the short excursion into foreign parts on which I have been taking you, I must, I think—if only to account for some of the limitations which English Courts have imposed, and still impose, on the growth of the remedy of specific performance—say a few words about the How and the Why of the introduction of that form of remedy into our system of jurisprudence.

Although natural justice might—so at least it seems to me—have been expected to suggest and recommend specific performance as the primary, normal, remedy for breach of contract, as a matter of fact the English Common law followed the example of Roman law in treating such a breach as giving a right merely to a claim for money damages, and nothing else.

Now it is obvious that in many cases—where, for instance, a man wanted, and had contracted to buy, some particular bit of land to round off his estate, or some unique

work of art—no sum of money would really compensate him for not getting the very thing he had bargained for. And so it gradually came about that one Lord Chancellor after another, exercising in his court of conscience (as the Court of Chancery is called in an early case[1]), a jurisdiction of rather indefinite extent, and quite independent of the Common law Courts, made it one of the principles of their equitable system to decree the specific performance of contracts, not indeed universally, but in certain classes of cases, and particularly in cases where damages would not, in the view of the Court, be an adequate remedy for the breach.

It may nowadays seem odd, but it was human nature, I suppose, that the Common law Judges keenly resented this common-sense—not to say laudable—action of the Chancellors as a usurpation.

Of the strength and persistence of the Common lawyers' opposition, a striking illustration is to be found in Serjeant Rolle's report of a case of *Bromage* v. *Genning*,[2] decided in the King's Bench in the reign of King James the First—in the year 1616—at which time, mind you, specific performance decrees in Chancery were certainly no novelty, for we can trace them at least as far back as the reign of Richard the Second.[3]

The learned Serjeant's report of the case extends to only between sixteen and seventeen lines of print; but in that short space he contrives to bring the whole scene before his readers most graphically and dramatically.

" Bromage," he says (I am translating his language into modern English) " sued Genning in the Marches of Wales for not making a lease according to his bargain, and thereupon a prohibition was prayed for by Bridgeman [the

[1] Selden Society's *Select Cases in Chancery*, 123.
[2] 1 Rolle, 368.
[3] See Selden Society's *Select Cases in Chancery*, p. xxxv.

defendant's counsel], because [he argued] the plaintiff might have an action on the case at Common Law. Serjeant Harris [plaintiff's counsel] said, "The suit there (*i.e.*, in the Marches Court) is solely to compel the party [defendant] to execute the possession; that is, to make the lease according to his bargain, and not to recover damages; and that," he added, "is usually done in Chancery."

Whereupon the Court (Lord Chief Justice Coke and Justices Doddridge and Houghton) said, "Undoubtedly (!) a Court of Equity ought not to do that (*i. e.*, to enforce specific performance); for then (*i.e.*, if it does that) to what purpose is the action on the case and covenant?"—a question which at the time remained unanswered, but has been answered in what they might have considered a disrespectful manner by modern legislation.

The Chief Justice went on to say, that the enforcement of specific performance "would subvert the intention of the covenantor; since he"—note the morality of this—"intends to have it at his election, either to lose damages or to make the lease, whereas they (*i. e.*, the plaintiff and his advisers) wish to compel him to make the lease against his will! But," said the Chief Justice, "it's like the case where, if a man binds himself by obligation to enfeoff another, he cannot be compelled to make the feoffment."

Mr. Justice Doddridge added, "What if a decree were to be made that the defendant ought to make the lease, and he won't do it? There's no other remedy but to imprison him bodily!"—which, after all, is a remedy which the Court of Chancery, and its successor the High Court, have not been afraid of using, and have found tolerably efficacious.

These remarks from the Bench, however, were apparently quite too much for Serjeant Harris, and made him throw up the sponge. He confessed (the reporter briefly tells us) that he had argued as he had done "against his conscience (!), just because of the practice in Chancery."

"And a prohibition was granted accordingly." But the whirligig of time brings about its revenges; and if the ghost of that unsuccessful plaintiff Bromage had chanced to be flitting through the Lord Chancellor's Court nearly two centuries later, it might have had the consolation of hearing Lord Chancellor Erskine declare[1] that "*Bromage* v. *Genning* . . was the plainest case (*sc.*, for specific performance) that can be stated," and that the ground taken by the King's Bench Judges against the Chancery jurisdiction was "the most untenable, preposterous, and unjust."

But though our English Courts of Equity triumphed over Common law opposition in this matter, and long ago firmly established their "extraordinary" jurisdiction to decree, and to enforce, in case of need, by imprisoning recalcitrant defendants, the specific performance of contracts—"extraordinary" as it was called, not because there was anything wonderful, eccentric, or unnatural about it, but merely because it stood outside, and apart from, the ordinary jurisdiction which the Common law Courts exercised, in giving damages as the sole remedy for breach of contract—still the opposition had a noteworthy effect in limiting the field of exercise of the special Chancery jurisdiction. For, not caring, I imagine, to carry their interference any further than the imperative claims of equity required, the Chancery judges refrained from granting specific performance in any case in which the Common law remedy of damages appeared to them to afford a substantially adequate measure of relief.

The upshot was that, gradually, the jurisdiction in specific performance became thoroughly systematized. At least as long ago as Lord Eldon's time, the principles on which it was exercised had become fixed and settled; and, indeed, in one of his judgments,[2] delivered in the year 1818, that

[1] In *Halsey* v. *Grant* ([1806], 13 Ves., at p. 76).
[2] *Gee* v. *Pritchard* (2 Sw., at p. 414).

great Chancellor took occasion to say that nothing would give him greater pain than the recollection that he had done anything to justify the reproach which, more than a century before, had been cast against Equity Courts by the famous John Selden,[1] that the equity administered in the Chancellor's Court varied from time to time, like the length of the Chancellor's foot.

This systematization of equity doctrines and principles involved the drawing of well-marked lines of distinction, which are still observed, between certain classes of contracts which Courts of Equity would enforce specifically, and certain others which they would not so enforce.

To these distinctions, and the reasons for them, I will now for a few minutes ask your attention.

In the first place, then, specific performance is—as you doubtless know—obtainable generally in cases of contracts which are "executory" contracts; that is, which contemplate something more to be done in pursuance of them, such as the execution of a conveyance, lease, or other deed; and which relate to land, in the widest sense of that word. It was with particular, if not exclusive, reference (I think) to contracts of this class that, in a very recent case, a learned judge[2] expressed his view of the jurisdiction which we are considering, in a couple of sentences, which I will venture to quote to you:—

"To my mind" (he said) "the whole doctrine of specific performance rests on the ground that a man is entitled, in Equity, to have *in specie* the specific article for which he has contracted, and is not bound to take damages instead. The right to sue on a contract is the same in law and in equity, but the remedies differ, and a Court of Equity will grant the equitable remedy in all cases, so far as I have been able to discover"—meaning, no doubt, all

[1] In his *Table Talk*, 2nd Edition, p. 49.

[2] Farwell, J., in *Hexter* v. *Pearce* ([1900], 1 Ch., at p. 346).

cases of contract falling under any of the heads which the Court regards as subjects for specific performance—"unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or, in some rare instances, where there would be a great hardship imposed on an innocent grantor or lessor, by reason of some mistake which he has made, although the other party has not contributed to it."

I said just now that contracts relating to land, in the widest sense of that word, are enforceable specifically. Within the category of such contracts may fall a contract to sell debentures charged on land, or to assign a share of partnership assets comprising land; and, further, the jurisdiction is not confined to cases where the land is situate in England.

For, though an English Court of Equity cannot by its judgment act directly upon land abroad, still if the person, against whom it is desired to enforce a contract relating to such land, is in this country, he can be sued here, and the Court, by bringing the pressure of its process to bear upon him personally,—for *æquitis agit in personam*—can in this way compel him to perform his contract specifically. The leading case on this subject is *Penn* v. *Lord Baltimore*,[1] the plaintiff being that famous William Penn, founder of the colony of Pennsylvania, who lies buried in the Quaker's burial-ground at Jordans, near Beaconsfield. In that case, Lord Hardwicke, in the year 1750, decreed specific performance of a contract relating to the boundaries of the then provinces of Pennsylvania and Maryland in North America.

But, though contracts relating to land constitute the largest and most familiar class of contracts which come before our Courts in actions for specific performance, there is a large variety of other kinds of contracts, performance

[1] 1 Vesey, sen. 444.

of which may, in accordance with the rather curious rules and precedents enshrined in the Equity Reports, be enforced specifically.

For instance, the Court has so enforced contracts to purchase or sell life-annuities; awards; contracts for the sale and delivery of chattels which are unique or of peculiar value to the plaintiff; agreements to compromise; contracts for the purchase of debts; contracts dealing with expectancies; family arrangements (whatever be the nature of the property to which they relate); contracts for the sale of business premises with the goodwill annexed to them (though not contracts for the sale of goodwill alone); contracts to execute mortgages for securing the repayment of moneys actually advanced (though not contracts to lend or to borrow money); contracts to settle personal property on marriage; contracts to sell a share in a partnership; contracts to sell or assign a patent, or even patent rights to be acquired in the future; contracts to execute a bond or other deed; contracts for the sale and purchase of reversionary interests, if made "*bonâ fide* and without fraud or unfair dealing;"[1] contracts between husband and wife, when engaged in matrimonial litigation, providing for a present, immediate separation, the Court directing the execution of a proper separation-deed; contracts, even by parol, for the sale of shares in companies, provided, of course, (in this as in other cases) that performance is not impossible, that is to say, that the vendor has got, or can get, the shares which he contracted to transfer; and, finally, contracts for the sale of British ships. Indeed, there is a reported case[2] in which, 50 years ago, specific performance was decreed of a contract to sell a barge.

On the other hand, there are (as I have already mentioned) not a few classes of contracts which the Court of Chancery

[1] Sales of Reversions Act, 1867, s. 1.

[2] *Claringbould* v. *Curtis* (21 L. J., Ch. 541).

declined—and the High Court, in the exercise of Chancery jurisdiction, still declines—to enforce specifically; and these it behoves every practitioner to know; but the knowledge is hardly likely to come to him in anything like completeness by the unaided light of nature.

In the first place, then, the Court generally refuses to grant the remedy of specific performance in cases where it considers that the Common law remedy, *i.e.*, damages for the breach of contract, is sufficient; in cases, for instance, of contracts for sale and delivery of Government Stock, or of chattels which are not unique or of peculiar value to the buyer. Among such ordinary chattels you may be interested to hear that human beings have in the past been reckoned; for there is a reported case,[1] of the time of King George the Second—the date is 1749—in which a specific delivery of fourteen negroes at Antigua was prayed; but Lord Chancellor Hardwicke said, "That is not necessary: *others are as good* (!)." And after adding that "as diamonds, one may be as good as another," he went on to say, "The negroes cannot be delivered in the plight in which they were at the time of the demand; for they wear out with labour, as *cattle and other things;* nor could they be delivered on demand, for they *are like stock on a farm;* the occupier could not do without them" (!).

The reason usually given for the refusal of specific performance in cases of breaches of contracts for the sale of stocks and chattels is, that money damages, calculated on the market price of the stocks or chattels, are just as good for the buyer as delivery of them; inasmuch as with those damages, and the money which he would have had to pay under the broken contract, he can go into the market, and buy a like quantity of the stocks and chattels. But, if that were really the only reason, it would, I venture to think, be an insufficient and unsatisfying reason. For, on principle,

[1] *Pearne* v. *Lisle*, Ambl. 77.

why should all the trouble, and waste of time and money, incidental to this roundabout way of getting what he bargained for, be imposed on the buyer? Why should not the vendor, provided of course that he has got, or can get, the stocks, goods, or other chattels which he contracted to sell, say a shipload of Argentine ponies, or a flock of sheep, or a dozen bicycles of a standard pattern, be ordered, and, if need be, compelled to deliver the same in accordance with the actual terms of the contract?

The explanation—for it is not an answer—I believe to be, that the real reason why the Court of Chancery originally would not specifically enforce such contracts was that, in view of the strenuous opposition of the Common law Courts to the specific-performance jurisdiction, the Chancellors did not care to interfere with the ordinary course of the law in cases where anything like approximate justice could be obtained in that course; or, in other words, except in cases for which there was no remedy at all at Common law, or in regard to which the Common law remedy—damages—would be clearly inadequate.

However this may be, I do not for a moment imagine, or suggest to you, that anything short of an Act of Parliament would now induce the High Court to grant specific performance in cases of the class to which I have just been adverting. For, in regard to the exercise of the equitable jurisdiction in relation to specific performance, precedent has enormous weight, and, as a Lord Justice said in a recent case,[1] "After all, to what extent a Court of Equity will go, is very largely one of authority as to what has been done before."

The rule of non-interference, where the Court considers that damages will do, has also been illustrated by cases in which the Court has refused to enforce specific performance of a contract to let property for a single day,[2]—

[1] *Scott* v. *Alvarez* ([1895], 2 Ch., at p. 615). [2] *Glasse* v. *Woolgar*, (41 Sol. Jo. 573).

this was on the occasion of Her late Majesty's Diamond Jubilee in 1897—and, in an earlier case,[1] of a contract to let for one year only. But the last-mentioned case must be regarded, I think, as coming very close to the dividing line; for it has quite lately been decided[2] that specific performance of a contract to let from year to year is capable of being specifically enforced.

W. DONALDSON RAWLINS.

(To be continued.)

III.—CRIMES AND PUNISHMENTS.

CRIMES may be roughly divided into crimes of passion and crimes of deliberation. Some are no doubt of a mixed character, and some punishable offences may not come under either head. But the distinction is nevertheless of some use in dealing with punishments. The majority of crimes fall readily under either the former or the latter head.

Crimes of passion are often committed on the spur of the moment, without considering the consequences at all. At other times they are committed under the influence of such strong passion that the criminal is utterly regardless of the consequences, although foreseen. To this latter type belong murders followed by suicide, or attempted suicide, or in which the murderer immediately gives himself up to justice, or makes no attempt to conceal the crime or to escape. No system of punishment will have much effect in checking crimes of this kind, and it is idle to expect that they will ever be completely suppressed. It is practically useless to increase the severity of punishment in such cases. Indeed,

[1] *Clayton* v. *Illingworth* (10 Hare, at p. 452).
[2] *Laver* v. *Koffler* ([1901], 1 Ch. 543).

the criminal is often reckless of life, and rather desirous of death than otherwise, and the prospect of a long term of imprisonment would probably act as a stronger deterrent than the fear of death. When there is a temporary increase in crimes of passion, it is useless to cry out for severer measures of repression. If the severity or leniency of punishment is not wholly uninfluential, its effect is at all events but very trifling. As regards the individual—assuming that he is not executed—it may be possible by a course of treatment to induce him to repress his passions and to abstain from crime after his release. But without any imprisonment this moderation of the passions would usually come with advancing years; and if imprisonment possesses any special efficacy in this respect, that efficacy perhaps consists in rendering the offender prematurely old. Repressing the expressions of passion while the passion itself remains untouched is, I believe, of no advantage whatever; and what more than this does imprisonment under ordinary conditions effect, except by rendering the culprit prematurely old? However, in my opinion, the main object of punishment should not be to influence the offender himself, but to influence other people. And it is practically impossible to influence persons whose passions are very strong, by the punishments which we inflict on other people for indulging similar passions. Crimes of passion are usually committed by young people—often first offenders. If every young person convicted of such offences could be "discharged cured" when no longer young, the effect of these cures on our criminal statistics would be almost imperceptible—certainly not greater than if all persons thus convicted were promptly hanged. Before considering the proper punishments for each offence, it is necessary to consider what punishments in general can be expected to effect, and then we shall not condemn any system (actual or proposed) merely because it does not or would not

accomplish what is really impossible. Crimes of passion will no doubt diminish with the progress of civilisation. The principle of the survival of the fittest will diminish the number of persons who are carried away by their passions, and whose strong passions would perhaps have conduced rather to their preservation than to their destruction in a different and less civilised state of society. Children, too, will be better taught to control their passions—not merely the expression of them—and will have stronger moral, social, and religious reasons for controlling them. I do not despair of a large reduction in crimes of passion; but the Criminal law and its administration will have to take a back-seat as regards the reduction of this kind of crime. And humanity should be our main guide as regards punishment whenever there is very little to be effected by inhumanity. The main check upon leniency to prisoners convicted of crimes of passion is the risk of letting them loose on society while still dangerous. Those who have shown themselves to be really dangerous ought not to be let loose till there is good reason to think that the danger has passed away. Without maintaining that every person who commits a crime of passion is insane, the treatment should, I think, be pretty much alike in both cases, except in so far as we desire to influence others.

Confining our attention, then, to crimes with respect to which punishment may be expected to prove effectual—crimes of deliberation—there is always a conflict between motives to commit and motives to abstain. To reduce crime we must weaken the former class of motives and strengthen the latter. Crimes of deliberation, to which the present remarks apply, are usually committed for the sake of gain. Here we have to consider, in the first place, the amount to be gained and the difficulty or ease with which it can be gained. But there is a third element not to be overlooked, viz., the necessities of the person who is tempted

to commit the crime. To a starving man the acquisition of even a small sum of money may be a very strong motive to action, while to a wealthy man the acquisition of a pretty large sum would afford no real temptation. A state of things in which every person willing to work and not guilty of misconduct possessed a moderate competence (or the means of acquiring it), would greatly reduce the motives for dishonesty; and though it may be impossible to bring about this condition of things, it can be much more nearly approximated than at present. The Legislature should keep this approximation constantly in view. That the ease with which certain robberies can be effected has often led to the crime, has been strongly insisted on, among others, by Sir Robert Anderson. That many persons are much too unguarded in this respect cannot be doubted, and this fact affords one reason why the State should not undertake the task of restitution. There has been contributory negligence on the part of the loser; and restitution out of the rates or the revenues of any public body could seldom be carried out without the allowance of many fraudulent claims. But as regards the weakening of the motives to crime, criminal legislation can effect but little. Its office is to strengthen the motives for abstaining from crime.

A man who is meditating whether he will commit a crime or not, will naturally consider two things, namely, the chance of detection, and the punishment which he will undergo in the event of detection. The former appears to be the more potent element. This is the real meaning of the maxim (often repeated) that it is the certainty, not the severity of punishment, which deters. This maxim is sometimes misinterpreted as if the deterrent element lay in the certitude with which the precise nature of the punishment could be predicted, assuming that the crime were brought home to the man who committed it. I do not believe in the superior efficacy of such sentences. Suppose, for

instance, that in case of an offence the sentence for which may now vary from fourteen days' imprisonment to fourteen years' penal servitude, a law were passed that a sentence of fourteen months' imprisonment should be imposed in all instances. Some persons who now commit the crime on the chance of getting off with a mild sentence would no doubt abstain; but others, who are at present deterred by the chance of a very heavy one, would be prepared to take the risk of fourteen months' detention for the advantages which they expected to gain. In short, some criminals are sanguine, and always hope for the best; others are timorous, and apt to anticipate the worst. A fixed sentence for all persons guilty of a particular kind of crime might deter some of the more sanguine but would encourage the more timorous. There are strong objections to any Procrustean system, and no such system would afford the kind of certainty that involves a really deterrent element. I do not believe that our present system gives too wide a discretion to the judges, though perhaps it does so to a single judge. Its real fault is, that we do not take sufficient pains to secure judges who can be relied on to exercise this discretion properly. Success at the Bar and political services afford no evidence of the qualifications which are really required for a good sentencer. Many judges are "faddists." Others simply follow precedent instead of exercising their own judgment. Others again base their sentences on erroneous principles.

Many men—and by no means bad men—are of an adventurous disposition, and will run great risks where they can rely on their courage, skill, and endurance to get through these risks successfully. Mountain-climbers and hunters of savage beasts often exhibit this trait in a high degree, but there are numerous other instances in which we see the same spirit exhibited. Now criminals are often adventurous men, and do not hesitate to incur great risks

in cases where they can rely on their own skill and prowess to extricate themselves. This, for example, often occurs with poachers, and every burglar runs some risk in his adventures. But the most adventurous man will hesitate when the odds are strongly against him; and as the chances of detection become greater the adventurous criminal will feel greater hesitation in incurring them. When a man risks his life in following a lion or a tiger he thinks the odds are in his own favour; if he thought they were in favour of the lion, he would not undertake the pursuit. With many persons a certain amount of risk is an inducement not a deterrent; but when the risk approaches certainty, few persons will face it except as the less of two evils. If detection were absolutely certain, very few crimes of deliberation would be committed, even though the resulting punishments were mild. The certainty of conviction is thus a more potent element than the judicial punishment resulting from the conviction. And it should not be forgotten that this judicial punishment is not the only one which the convicted criminal incurs. There is almost always a social ostracism, which besides its unpleasantness renders it difficult for the ex-criminal to earn a living and almost impossible for him to obtain a position of trust. And it may be added that, as the moral standard of society becomes higher, this social ostracism will usually become more severe, and will therefore stand in less need of being supplemented by severe judicial punishments. A rational man when meditating a crime takes this ostracism into consideration; and he probably reflects also that strong suspicion often carries with it this result even when the prisoner is acquitted. It need hardly be pointed out how much the great extension of the press and of the reading public contributes to this result. It is by no means certain in times like these that a guilty man who is acquitted has escaped scot-free. The consequences of having been

suspected and accused, and not having completely established his innocence, may be almost as deterrent as those of a lenient sentence.

That with our present police system, and our present system of Crown counsel and solicitors, the chances of detection and conviction are greatly increased is evident. Indeed, so much State aid is now given to the prosecution, while little or none is given to the defence, that the evil to be guarded against is rather the conviction of the innocent than the escape of the guilty. When the element of certainty is thus increased, that of severity may be relaxed without increasing the amount of crime. This has been done to a considerable extent; and there are strong reasons for believing that the average relaxation might with safety be carried farther.[1] No relaxation hitherto adopted appears to have been followed by any outbreak of crime. But the avoidance of extreme severity in punishment may be urged on other grounds than that the increased prospects of detection have rendered it unnecessary, or even that society now treats convicted persons more harshly than in the past. Very severe sentences interfere with the certainty of detection. They render the public unwilling to give information or evidence, and the jurors unwilling to convict; while after conviction, the sentence often excites such a strong expression of public feeling that the Home Office is compelled to make some concession (though often a very insufficient one) to it. And if we are still to be left without a Court of Criminal Appeal, the Home Office must, in the future, be more and more influenced by public opinion, and re-trial by newspaper must become the usual course. For the Home Secretary is the responsible minister of a free people, and the secrecy with

[1] Since this was written I have learned that the Home Office has decided to liberate well-conducted persons sentenced for life at the end of fifteen years, instead of twenty years as heretofore. This is a step in the right direction. I hope to see the period reduced to ten years.

which his present proceedings are enshrouded cannot be tolerated much longer in an age like this. Over-severity in sentences would indubitably render convictions less certain, and thus diminish the force of the deterrent element which is at present most powerful. For example, there is a growing feeling against capital punishment. This feeling will lead to a failure to convict many murderers unless the Home Secretary commutes the sentence in all cases where there are extenuating circumstances—at least, if the jury has recommended the prisoner to mercy. Hanging a prisoner who has been thus recommended to mercy is bad policy, whatever may be said of it otherwise; and I believe it usually arises from the fact that even at the Home Office, retribution is preferred to the public good. One would have expected more enlightened views to have been established in a Government Department long ago. A minister who acts from any other motive than regard to the public good ought not to be tolerated by his employers—the public.

There are, however, other reasons than the improved system of police and of prosecutions, and the higher moral standard of society, which render more lenient judicial punishments not only sufficient but desirable. Great alleviations of physical pain have been among the discoveries of recent times. Anæsthetics alone have worked marvels in this direction, but we have also our staffs of doctors and nurses supported by the public, with hospitals for almost every ailment. And along with these discoveries there has been a growth of humane sentiment—a desire on the part of the public to relieve or remove bodily pain wherever that is possible. Painful punishments, which were formerly defended on the ground that the pain was no greater than that which innocent persons suffered every day from accident or disease, became no longer defensible on that ground. Flogging, for instance, was formerly not more painful than many operations that innocent people

submitted to; but now that these operations are performed under the influence of anæsthetics, the parallel is no longer applicable. In judging of the severity or leniency of punishments, we are all influenced largely by comparison. We compare punishments with each other on the one hand, and with the sufferings of the innocent on the other. And if we can effect a large reduction in the sufferings of the innocent, punishments which formerly seemed just and reasonable will naturally come to be regarded as unduly severe. Where an offence is heinous, any amount of pain which is not unusual will not be regarded as too severe a punishment; but when improvements in medicine and surgery, and arrangements which make these more available to the public, have rendered this degree of pain unusual, it comes to be regarded in a different light. I am a total disbeliever in the theory that the State should seek to punish every criminal according to his ill-desert, regardless of whether the public would or would not gain anything thereby; but any attempt to carry out this theory in practice involves the preliminary question, How much physical or mental suffering is equivalent to a given amount of moral delinquency? In this general form the question is unanswerable. All that can be done is to start with the ordinary punishment for some ordinary crime, and then to work upwards and downwards, determining (by very rough methods) how much should be added or subtracted in order to punish the criminal whose case we are considering, on the same scale. This mode of estimating merit or demerit would not be affected by a general reduction in punishments, nor do I see in it any reason why such a general reduction should not be adopted. Even the *lex talionis* (if not applied in a literal manner) is affected by our modern methods. If under our improved medicine and surgery the injury causes less pain and inconvenience than before, why should the amount of pain and inconvenience involved in the punishment remain

constant? And in these days injury which formerly cost an eye or a limb might not lead to such serious consequences.

Another change which should not be lost sight of is our higher standard of comfort. A great part of every punishment consists in the change in the criminal's condition; and there have been instances in which persons have committed crimes, not with the hope of escaping punishment, but because they thought that imprisonment would be a change for the better. The greater the change the more it will be felt; and therefore if prison conditions remain unaltered, the same term of imprisonment will become a progressively severer punishment as the country becomes more prosperous. The really deterrent element is not the criminal's condition while in prison, but the difference between it and his condition when at large. The man who has little or nothing to lose by imprisonment will commit crimes for much slighter reasons than the man who would lose a great deal; for, as the punishment consists in the change, it is much severer in the latter case than in the former.

Nor is this all. No inconsiderable part of our punishments, as already noticed, consists in the disgrace attached to them, and owing to the popular belief in the justice of our punishments, this disgrace is greatest when the punishment is most severe. We think worse of a man who has undergone penal servitude than of one who has undergone simple imprisonment, and worse of a man who has been imprisoned than of one who has been let off with a fine or released on probation. But this disgrace does not depend so much on the actual punishment inflicted as on its position in the scale of punishments. If the heaviest sentence in our Statute book were six months' imprisonment, that term would be regarded as a great disgrace; but if it were the lightest punishment inflicted by the law, we should look upon it in an opposite light as affording evidence that the offence was a trivial one. "The imagination,"

wrote Montesquieu, "lends itself to the custom of the country; and eight days in prison or a slight fine have as much terror for an European brought up in a country of mild manners as the loss of an arm would have to an Asiatic." No punishment—not even that of death—will appear very disgraceful or very terrible where it is in constant use. It is natural to men to reflect that they can bear what others have borne. But almost any punishment will come to be regarded as terrible and disgraceful if it stands at the head of the scale and is reserved for the most heinous offenders. If, when a man was to be honoured for some great service to his country, our ancestors had placed him in the pillory to be seen by all the passers-by, the pillory, though not very comfortable, would have been regarded as an honour, not a disgrace, and flowers or laurel-wreaths would have greeted the occupant. The manner in which a punishment is regarded by the public is almost as important as the pain or discomfort involved in the punishment itself.

A punishment to which these remarks are specially applicable is that of flogging. A century and a-half ago flogging was a punishment chiefly used in the case of minor offences—the usual sentence being "to be whipped and discharged." It was no doubt even then regarded as disgraceful for any person belonging to the higher classes, and was for that very reason sometimes applied to political or religious offenders. But as regards the lower orders, flogging was the punishment of petty offenders, while death or transportation were the penalties inflicted on those guilty of more serious crimes. But flogging is a punishment which admits of little change, and the little change that has taken place is perhaps in the direction of increased severity: and consequently, as our average sentences have become more and more lenient, flogging has gradually ascended higher and higher in the scale, until from being the special punishment of petty offenders it is now practically confined to those

whose crimes are of the most heinous description. I speak of adult offenders: for we still flog boys for the merest trifles, and many persons regard these floggings as no great disgrace. The retention of flogging in some of our public schools, where the barbarous methods of the Middle Ages still prevail, seems to be the only rational explanation of this distinction. A boy is less able to bear a flogging than a man, and the manner in which boys are flogged would be considered disgraceful if applied to men. But whatever is customary is not considered very disgraceful, and as long as it is usual to flog boys at schools, the judicial flogging of boys will probably be continued. We are indeed told that the object is to save the boys from the indelible disgrace of imprisonment, though men flogged in the same way would be regarded as having undergone a greater disgrace than that involved in imprisonment. And who is to fix the age-limit which separates the man from the boy? The disgrace, or absence of disgrace, is evidently not to be found in the punishments themselves, but in the opinions which the public entertain with regard to them. A man may not regard his punishment as disgraceful, but if the public thinks it disgraceful he is in the same position as if it really were so. He experiences all the ill consequences of the disgrace. A disgraced man is banned by society, excluded from many employments, disowned by many of his friends, and, speaking generally, placed in an extremely uncomfortable position. And however our scale of punishments may be altered, those which stand high in the scale will be regarded by the public as disgraceful, while those which stand low will be regarded as of a more venial character. It was Sir James Fitzjames Stephen, I think, who advocated the continuance of capital punishment for murder, on the ground that it kept up the popular belief in the heinousness of the offence, and thus deterred people from committing it. There is not much force in this argument,

If we wish a man to experience the deterrent effects of disgrace and popular odium, his life must be spared. The man who is hanged often receives an amount of sympathy which would be replaced by aversion if his sentence had been different. And an ungrounded belief in the heinousness of any offence cannot be kept up for any considerable time in an enlightened age by attaching an unusually severe or disgraceful penalty to it. Public opinion and sentences, however, act and re-act on each other, and it is often of real importance to keep them in harmony with each other. This fact is, I fear, often overlooked at the Home Office. The object of the Home Secretary should be the public good, not the administration of inflexible justice. To fly in the face of public opinion because the Home Secretary (or rather some subordinate), thinks that the prisoner *deserves* more than the public is willing to sanction, is in every respect an undesirable course—not to mention that there are many reasons for believing that the justice administered by this secret tribunal is of a Procrustean character. A comparison between the number of cases in which the death-sentence was commuted to penal servitude for life, with those in which it was commuted to a term of years, would be interesting. No sane man could regard the demerits of all these "lifers" as even approximately equal, nor probably did the Home Secretary, when passing the same sentence on all, really intend to inflict the same punishment. "Wait till the public demand has subsided, and then do what the public asked you to do," is about the worst principle that a responsible minister could adopt. But it is supposed by some to be the proper way of showing that attachment to inflexible justice (or capricious mercy) which ought to find no place in any public department. The public good should be the end and aim of every responsible public official. And this remark is as true of judges and magistrates as of the Home Secretary. They

were not appointed in order to give them an opportunity of airing their "fads," or of showing their determination of doing everything by machinery, and disregarding the sentiments of the public whose servants they are. This, however, can be done with comparative security in criminal cases because the facts are usually known only locally, and a minister with a Parliamentary majority at his back can discard local opinion whenever he thinks proper to do so. But constant disregard of local opinion must ultimately range public opinion on the opposite side. The public confidence in the justice and mercy of the Home Office has been much shaken of late years, though it is still probably excessive. There is no merit whatever in rigid adherence to rule, or in the stern carying out of retributive justice (as it is called), unless tending to the public good; but narrow-minded officials often prefer rule and precedent, and what they call principles, to the wishes and interests of their employers—the public.

If the principles which I have been advocating are well founded, it follows that a fixed Criminal Code (so far as punishments are concerned) is an absurdity. We cannot determine the most suitable punishment for any particular crime without entering into considerations of time, place, and circumstance. A man detected in stealing the scanty resources of a starving expedition must be punished very severely, while the same theft, committed under ordinary circumstances, would be dealt with much more leniently, although the motive for it was much weaker. And troops in actual war are rightly punished for certain offences more severely than in times of peace. Again, punishments change, and ought to change, with the progress of society. The public can now be adequately protected by methods that would probably have failed to supply the requisite protection if adopted 200 years ago; and, assuming that our moral and material progress continues unchecked for

another century, few persons who give their attention to the subject will doubt that it will then be possible to protect the public by a system of punishments much more lenient than the present. The principle of evolution must be recognised in this as in other departments; and our legislators and administrators of justice should rather seek to lead public opinion than to follow in its track, "with fainting steps and slow." A conflict between public opinion and officialism, would go far to neutralise all the advantages which have hitherto been derived from the coincidence of State punishments with the punishments inflicted by society. When once a person whom the State has elected to treat as a criminal is received in society as an injured and innocent man, the consequences will be very far-reaching. But what if the Home Office pronounces a very unexpected decision (to those who know anything of the facts), and then refuses to assign any reason whatever for it? The concurrence of State punishment and social punishment is worth maintaining, even at the cost of compelling judges and officials to descend to a compromise. *Non possumus* is a very undesirable attitude when no reason for the inability is assigned, or perhaps capable of being assigned. Every man has faith in his own opinions, but neither judges nor officials are infallible, and the public cannot be expected to rest satisfied with their "I think so, but I will not tell you why!" Every public servant should be prepared to justify his action to the public whenever he is seriously called on to do so. The officialism which usually resists any change, often keeps up a system of punishments long after it might have been relaxed with advantage. Without discussing the question whether capital punishment might be advantageously abolished, surely the death-sentence for murder might now be safely commuted in a larger proportion of cases than formerly. But the signs of improvement in this respect are faint and dubious. The old

theory of requiring extenuating circumstances (often in the evidence not the crime) for a commutation is still adhered to, instead of requiring circumstances of aggravation for an execution. The Legislature moves slowly; the judges move slowly; the Home Office moves more slowly still. All are alike falling behind public opinion, which moves more rapidly than they. But a fixed system of punishment involves a complete disregard of the law of evolution. No system can be permanent; and an attempt to keep up any system, after the original conditions have been materially altered, can only result in the administration of public justice falling behind the age. It is better to go forward of one's own accord than to be dragged forward against one's will. The motion will no doubt be slower in the latter case, but the more rapid motion will probably prove more beneficial to the public than the slower. A brake on a wheel is frequently useful, but many public departments are over-supplied with brakes and under-supplied with motive power.

It was Plato, I think, who said that in a perfect State no punishments would be required. The statement was true, but no State can ever be perfect. But the more nearly we approach to perfection, the fewer and milder will be our punishments—at least, if we promptly reduce them to the minimum which at each stage of progress is required for the adequate protection of the public. A State in which punishments are numerous and severe is always backward and uncivilised.[1] Numerous and severe punishments may be necessitated by its condition, but the great aim of a wise ruler should be to alter that condition, and thus to render fewer and milder punishments admissible. No one

[1] The alleged success of punishment of flogging in the State of Delaware—usually inflicted at the whipping-post—has formed one of the chief arguments relied on by the advocates of flogging. The recent lynching case at Wilmington, the capital of Delaware, and the disturbances which followed it will, I hope, satisfy the British public as to the true condition of civilisation in this model State.

can at present foresee how few and how mild the punishments required for the protection of the public may ultimately become. But we know that there are causes now operating which must ultimately effect a considerable reduction in both the number and the severity of our present sentences; and it is wiser, as well as more humane, to facilitate the action of these causes rather than to struggle vainly against them. Change—progress—is the law of our nature; and the sooner this principle is recognised in every department, the better it will be for all concerned. Every judge and every Home Secretary should put to himself the questions, What advance have I made on my predecessors? and, Am I keeping abreast of the general progress of society? The advocates of a more lenient system may say, with Mr. Gladstone, "Time is on our side. You cannot fight against time"—not, of course, that it is possible to reduce punishments at once to the extent to which we look forward with confidence in the future.

APPELLANT.

IV.—SHOULD THE TWO BRANCHES OF THE LEGAL PROFESSION BE AMALGAMATED?

WE express no surprise—in fact, we look upon it rather as a matter of course—when we find that the laws of England differ from those of other countries. The two great indigenous systems of law that bear sway over the civilised nations of the West are the Roman and the English; the Roman being the foundation of jurisprudence in practically every country of continental Europe, the English obtaining in England, the British Colonies, and the United States of America. At the first glance, therefore, when we find a great distinction between a rule of English law and that referring to the same matter

in a continental country, we put down the difference to the difference of origin. The history of the two rules is different, and it is only in the nature of things that their present state should likewise be different.

But upon the question of the organisation of the lawyers we find that even those countries that have assimilated our laws and institutions most fully have most often rejected our division of the legal profession. In the United States and in most of the Colonies, the lawyer is a person who can undertake every species of legal business. That being so, it behoves us to examine the question, as regards England, somewhat closely. Is our division of the professions an historical accident, an anomaly that no other country will see introduced into their systems; or is it an example of the political wisdom of the Anglo-Saxons, an institution that we should preserve at all costs? Let us endeavour to balance the arguments.

The line of division between Attorneys and Solicitors and the Bar is of high antiquity. At one time, when the Inns of Chancery were flourishing bodies and stepping-stones to the Inns of Court, much of the education of the two branches was of one character; and there existed perhaps a greater spirit of fraternity in the times before the Inns of Court definitely resolved to close their doors upon the solicitors. But the essential distinctions have existed time out of mind :—the Bar with the exclusive right of audience in the Superior Courts, receiving fees only as honoraria, unable to sue for the recovery of them, and consequently not liable for negligence; the Solicitors seeing the clients, attending to the details, with no right of audience, able to sue for their fees, and liable for negligence. It may well be argued that a distinction that has existed so long ought not to be disturbed, that it has shown itself to be suited to the genius of the English people, and "what was good enough for our fathers is good enough for us."

The most essential division of the sphere of legal work is that of litigious and non-litigious, and if the distinction between the Bar and the Solicitors corresponded to this division it would at any rate have the merit of being logical. But the correspondence is only superficial. True, the Bar has the exclusive right of audience in the Superior Courts, and counsel's advice is taken at various steps during the proceedings preliminary to hearing, as settling the pleadings and advising on evidence; but otherwise the Solicitor takes charge of the whole of the detail work of an action. Then again, in non-litigious work, the whole of conveyancing business is now, since the extinction of the special class of conveyancers, the work of solicitors; but, nevertheless, counsel's opinion is often sought in cases of difficulty, and documents that require unusual care are sent to them to "settle." The legal work is therefore divided between the two branches in a manner that works smoothly enough as a matter of practice, but corresponds to no essential difference in the character of the work done.

To look now upon the other side of the picture. In the County Courts and Police Courts solicitors have a right of audience concurrent with that of the Bar. The jurisdiction of the County Courts, however, is limited in the case of Common law actions to amounts of £50 and under, and in Chancery actions to amounts of £500 and under. Is there any particular virtue in £50, that it should form the dividing line between two branches of a great profession? A disputed case involving £10 may raise as difficult questions of law, may necessitate as skilful an examination and cross-examination of witnesses to elicit the truth, as one in which £1,000, or even ten times that amount, is in dispute. Yet in the one case the hearing may be conducted by solicitors or barristers, in the other by barristers only. The actual condition of affairs in the County Court is only another instance of the fact that the real dividing line in

the profession is between those who undertake advocacy and those who do not. The major part of the work is in the hands of a class of solicitor advocates who make a speciality of it. Some recent cases declaring that the practice of one solicitor appearing for another, in a case in which he had not been directly instructed, was illegal, have afforded a striking instance in the same direction. So, too, counsel often appear at arbitrations and inquiries where they have no special right to be present, simply because they possess the training and the knowledge of advocates.

It is almost needless to insist upon the improvement that amalgamation would bring about in the status of solicitors. The solicitor, like the Parliamentary barrister, has nothing to look forward to in his profession but the accumulation of money. Though the professional education of the solicitor is quite as thorough as that of the barrister, yet with few exceptions all the positions of honour to which a lawyer may aspire are the exclusive perquisites of the Bar. Outside his profession, in Parliament, in municipal life, in literature, a solicitor may seek and gain a high position; inside it his energies are "cribbed, cabined and confined," to the one absorbing pursuit of monetary gain.

But the argument above all others upon which the question ought to be decided is that of convenience and cost to the litigant. Will it make law cheaper to unite the professions or not? That law can ever become really cheap we do not for a moment contend, because men must always pay, and will usually willingly pay, for making use of highly-trained minds, and the Law has always been essentially a learned profession. A little consideration will, however, make it clear that the amalgamation must tend to reduce the cost of a law suit, or rather to place it within the power of the litigant to say whether that cost shall be great or little. At present, whether he likes it or not, the client must employ at least two minds in the

conduct of his case. There is the solicitor who is conversant with the details, who knows him, and has seen all the witnesses: and there is the barrister (or more probably two, a leader and a junior), who is brought in to advise and to conduct the case in Court. If, on the other hand, there was but one legal profession, it would rest with the litigant to say whether he would engage the second mind and the third mind, or be content with the one. In a case of importance he would probably take the former alternative, but then the choice would be open to him—there would be no compulsion. This is what happens in the County Courts at the present time. If the case is an important one, or involves a principle, counsel are usually employed, but it rests with the client to say whether this shall be so or not. And as we think that this ground outweighs all others in importance, the only conclusion is that the fusion of the two branches eminently is desirable.

An analogy may be taken from the medical profession. There is no barrier but a customary one between the consulting physician and the general practitioner, and no work which the former has an exclusive right to perform. The patient employs the consulting physician, the second mind, or not as he desires. And that, we venture to predict, would be the condition of a united legal profession. There would certainly be a special class of advocates, but it would be optional to employ them, while the profession would be a single body, to the great advantage both of its members and the public at large.

H. J. RANDALL.

V.—THE MARRIAGE LAWS OF SCOTLAND.

(*Continued from page* 338.)

THE practice is this: If the parties reside in different parishes, proclamation must be made in both. The order of the Church requires this to be done on three successive Sundays; but practically this is often in non-observance, the announcement being made three times consecutively on the same Sunday, immediately before the commencement of morning service.[1]

2.—Until 1878, it was impossible to contract a regular marriage in Scotland without the previous publication of banns. In the above-mentioned year an Act was passed, entitled "An Act to encourage Regular Marriages in Scotland" (41 & 42 Vict. c. 43), of which the short title is "Marriage Notice Act," by which it was permitted to substitute a notice to the Registrar of a parish or district for proclamation of banns.

By section 18, the Church of Scotland was permitted to shorten the period of residence to "not less than fifteen days." This was done by an Act of the General Assembly of the Church of Scotland (Act VIII, Assembly, May 28th, 1880, Session II). The chief provisions are:

Section 1.—Residence in a parish for the space of fifteen clear days immediately preceding shall entitle persons purposing to marry, and to whose proposed marriage there is no impediment recognised by the laws of this Church, to have the banns of marriage proclaimed in the parish church, and without such conditions no proclamation of banns shall be allowed; subject to any exceptions which may be granted in the case of soldiers and sailors, or where one of the parties has been resident furth of Scotland.

The Assembly of 1879 had already passed the aforesaid Act VIII as an Interim Act on the Preamble: "The

[1] Wm. Bell, *Dictionary of the Law of Scotland*, v° *Banns.*

General Assembly, taking into consideration certain recent changes in the civil law of the country, calculated to affect the practice of the proclamation of banns of marriage so long enjoined by this Church, and deeming it of importance that said practice should be facilitated and encouraged in time to come, resolved (*follows the Enactment of Act VIII, May* 1880) :—

Proclamation of banns shall in ordinary cases be on two separate Sabbaths; but it shall be in the power of the minister to complete the proclamation of the banns in a single Sabbath in the case of persons who are known to him. In this case the certificate shall not be granted till forty-eight hours after proclamation has taken place.

Where one of the parties is furth of Scotland, and will not reside there during the three weeks preceding the marriage, the Act does not apply.

The Registrar-General for Scotland, in an official circular of 30th December 1878, states that, in the opinion of Crown Counsel, a registrar is not entitled to grant his certificate of publication in cases where one of the contracting parties resides in England or Ireland, or elsewhere furth of Scotland. In such cases, therefore, a certificate of proclamation of banns in the case of the party residing in Scotland is still indispensable. The present Registrar-General has elsewhere stated that "there is no express rule having statutory or "other legal authority as to how the case of the party "resident in England or elsewhere out of Scotland ought to "be treated." According to the same authority, the usual practice is for the officiating minister to ask such party (if a resident in England) to produce a certificate of publication of banns in the parish of his or her residence, or, if for any good reason this cannot be produced, to accept such evidence as he may consider sufficient that the party is in a position lawfully to contract marriage.

In this case, accordingly, the minister . . . . . may be

content with a certificate of the proclamation of the banns if one of the parties is resident in Scotland, or he may allow proclamation of the banns of the other party after less than fifteen days' residence in the parish.

In every case of persons residing in Scotland intending that a regular marriage shall be contracted between them in Scotland, without the proclamation of banns, each of such persons shall give notice of the intended marriage to the Registrar of the parish or district in which he or she shall have resided for a period of not less than fifteen clear days previous to the giving of such notice (sect. 7).

The Registrar shall, on the expiration of seven clear days after the receipt of the notice of an intended marriage, grant to the person who gave the notice a certificate of due publication thereof.

For the purposes of this Act, a certificate from a session clerk of the due publication of banns, and a Registrar's certificate granted under this Act, shall be of equal authority in permitting a minister, clergyman or priest, to celebrate a regular marriage.

Where both the parties reside in Scotland, one may proceed by banns and the other by notice to the Registrar.

The minister is liable to a penalty of £50, if he performs the ceremony without having produced to him a certificate that banns have been duly proclaimed or notice duly given.

A schedule must be procured by the parties from the Registrar of the parish or district within which they intend to solemnize the marriage. It is filled in by the Registrar and produced to the minister. After the ceremony, it must be signed by the latter, the parties and two witnesses, and is then handed back to the parties, by whom it must be transmitted, within three days after the marriage, to the aforesaid Registrar. On failure to do so, the husband, and failing him the wife, is liable to a penalty of £10.[1]

[1] Green's *Encyclopædia of the Law of Scotland*, v° *Marriage*, p. 269.

(c) *Capacity.*—1. The law of Scotland, so far as concerns the age of contracting parties, requires nothing more than they should be respectively of the ages of 14 and 12.[1] In the case of *Johnston* it was held that a boy could not marry until he was actually fourteen years old. It was not enough to show that he had then physical capacity to consummate marriage.[2]

At these ages the capacity of procreation is presumed, and this capacity is considered to be reason for entitling parties to marry, as "marriage ought not be made impossible by law between those who are capable by nature of being parents of children,"[3] otherwise they might "live in concubinage or be induced to commit fornication."[4]

Therefore no consent of parents or guardians is required. If parents should forbid the marriage, the contract would be valid in law, if what is held to constitute marriage was proved in fact.[4]

"In Scotland, children when they pass the age of puberty "—14 in boys and 12 in girls—are, in a sense, masters of "their own actions. They may choose their own domicile, "they may make their will as to personal property, they "are not bound to go to school though their parents desire "them, and they may marry though their parents forbid "them."[5]

However, in olden times, the consent of parents was required by the first Book of Discipline, and this rule was enforced by the Ecclesiastical Courts. The celebration without such consent was regarded as clandestine.[6]

"At the nynt Generall Assemblie, holden at Edinburgh,

[1] *Report on the Laws of Marriage*, 1868, pp. 78, 113; Fred. Walton, *Husband and Wife*, p. 2.

[2] *Johnston* v. *Ferrier*, 1770, Mor. 8931.

[3] *Rep.*, p. xxvii.

[4] *Rep.*, p. 78.

[5] Evidence of Mr. J. Anderson, *Rep.*, p. 82.

[6] This was also the doctrine in Ancient French Law. See *Belgique judiciaire*, 1903, p. 194, *Aperçu de l'évolution juridique du mariage.*

'Junij 25, 1565, John Willock, Moderator," it was "Inacted, "that marriage without consent of parents is unlawfull, "when not so much as sought, or represented to the Kirk, "and the transgressors to satisfie as shall be injoyned."[1]

It was regarded as an essential requisite in the rescinded Act of 1649, c. 47,[2] and by Lord Dirleton, who was a very learned judge, and was for a long time a judge in the Consistorial Court.[3]

2.—Marriage is forbidden between persons who stand to each other within certain degrees of kin. A relation of affinity is equivalent to a relation of consanguinity; for instance, the relations of a man's wife stand in the same degree to him as they do to her.

Marriage is forbidden between ascendants and descendants *ad infinitum*, and in the collateral line between brothers and sisters, consanguinean or uterine, and between all collaterals, one of whom stands *in loco parentis* to the other, *i.e.*, the brother or sister of a direct ascendant of the other, as uncle and niece, aunt and nephew, grand-uncle and grand-niece. Relationship by marriage is in all cases equivalent to relationship by blood; so marriage with a deceased wife's niece is unlawful.

In Scotland a marriage against the table of prohibited degrees drawn up in England by Archbishop Parker and inserted in the Book of Common Prayer would be invalid.[4]

3.—The General Assembly, held at Montrose in 1600, "becaus the mariage of persons convicted of adulterie is "a great allurement to committ the said cryme," thought it "expedient that a supplication be givin in to the nixt "conventioun, to crave an act to be made, discharging all "mariages of such persons as are convicted of adulterie;

[1] J. Row, *The History of the Kirk of Scotland*, p. 27.
[2] 6 Thomson's Acts, p. 369.
[3] *Rep.*, p. 138.
[4] Green's *Encyclopædia*, p. 250.

"and that the same be ratified in the nixt parliament"[1] Accordingly the Act 1600, c. 20, declared all marriages null which were contracted by divorced spouses with the persons "with quhome they are declarit be sentence of the "ordinar judge to have committed the said cryme and fact "of adulterie."

However, to make such a marriage null, the name of the paramour must have been inserted in the decree dissolving the former marriage, and it is very usual, writes Mr. Fred. Walton, to omit the name of the paramour in a decree of divorce.[2] There appears to be no modern decision on the subject, but Lord Fraser denies that it is in desuetude.[3] With reference to the older Scottish statutes, one important distinction must be kept in view which does not attain in England. The Scottish statutes are liable to desuetude; they are repealable, not by mere disuse, as the rule is in many countries, but by a contrary custom. "Our statutes," wrote Lord Stair, "or our Acts of Parliament, in this are inferior to our ancient law, that they are liable to desuetude, which never encroaches on the other. In this we differ from the English, whose statutes of Parliament, of whatever antiquity, remain ever in force till they be repealed."[4]

The Royal Commission on the Marriage Laws reported (p. xxvi) that this prohibition ought not to continue: "It is one of an arbitrary nature, depending on the terms of the sentence, not on the mere fact of adultery. Such penalties are found by experience inefficient to prevent evil, but they may prevent in some cases the only possible reparation of evils, past and irremediable, and it may well be doubted

[1] David Calderwood, *The History of the Kirk of Scotland*, vi, p. 24. Already, in the 9th Session of 1595, the General Assembly declared unlawful marriage, "when a person marieth another whom he hath polluted by adulterie" (5 Calderwood, p. 370).

[2] Fred. Walton, *Husband and Wife*, p. 10.

[3] Fraser, *Husband and Wife*, I, 144, 150.

[4] Lord Stair, *Institutes of the Law of Scotland*, book i, title 1.

whether they are in that respect of any public advantage." No steps were taken to give effect to this recommendation.

Irregular Marriages.

An irregular marriage, as distinguished from a clandestine marriage, is one which is contracted without any religious ceremony, by mere interchange of consent.

Marriages of this kind are divided into three classes, according to the manner in which it is proved that consent has been interchanged:

(a) *Per verba de præsenti.*
(b) *Per verba de futuro, subsequente copula.*
(c) *By habite and repute.*

Historical outline.—This kind of marriage has its origin in the Canon law, which was constructed on the basis of the Roman civil law. It was usual among the Romans to initiate an intended marriage by *sponsalia* or betrothal. A ring was commonly given in token of the interchanges of consent but, under no circumstances, did such engagement operate as matrimony.

Up to the middle of the twelfth century, the Church considered the *sponsalia* only as an engagement for future marriage. But a few years later, we find a marked distinction drawn between *sponsalia de præsenti* and *sponsalia de futuro.* The leading authority on the subject of *sponsalia de præsenti* is a rescript of Pope Alexander III to certain clergy of Lincoln, in the year 1170, in answer to a case presented by them for the Papal decision. Its essence is described, in the most explicit terms, in a rescript of the year 1236, by Pope Gregory IX (X, *de sponsaliis et matrimonio,* cap. 31, iv, 1).[1]

The earliest mention of such marriage seems to be found in a papal bull of 1429, in which Elizabeth, heiress of

[1] Friedberg, *op. citat.*, p. 203, where the text is quoted.

Gordon, is said to have contracted marriage with Alexander Seton, *per verba de præsenti publice juxta morem patriæ*. As justly remarked, the words *juxta morem patriæ* would not have been mentioned, supposing the Papal law had been exclusively followed.[1]

(a) *Marriage per verba de præsenti.*

As we have explained hereabove, the leading principle is, marriage makes consent. Therefore the Scottish law recognises no marriage except consent be deliberately interchanged; and if it be admitted, or if it be a necessary result from the proved facts of the case, that consent was not interchanged, then no amount of cohabitation and habit and repute will be sufficient to make marriage, according to the law of Scotland. These two things in short only create a presumption which may be set aside, and the burden of the proof shifted, upon the same ground as it is held to be shifted by foreign laws.[2]

Again, the parties to the contract must intend to contract. If the apparent consent is shown from surrounding circumstances or otherwise not to have been serious, there is no contract, as in the case of *Sassen* v. *Campbell* ([1824], 3 S. 159).

Sir James Campbell, unable to return in 1818 from Paris to Scotland on account of the war, and wishing to send someone to look after his affairs, gave his mistress a power of attorney in these terms: "I, James Campbell of Craigforth, having nominated my beloved wife, Lina Taline Sassen, my true and lawful attorney," etc. The lady was received in Scotland as Sir James' wife. But it was held afterwards, that this document was not granted for a matrimonial purpose, and no marriage was constituted.

In ancient French law, we find the same rule: "*Le*

[1] J. Riddell, *Tracts, Legal and Historical, chiefly relative to Scotland*, p. 174.
[2] *Rep. on Marriage Laws*, p. 137.

mariage ne se prouve point par paroles qui ne se sont dites à bon escient, mais seulement par raillerie ou risée, principalement par personnes éprises de vin et dont il appert évidemment."[1]

The most express declarations, oral or in writing, by both parties, that they are husband and wife, will not make them so, unless the judge is satisfied that the inward intention of their minds was in accordance with those outward words or acts.

This has been held, not only as to declarations concerning the past, which are mere elements in the proof of cohabitation with repute of marriage, but even as to *verba de præsenti*, which if sincerely spoken would have themselves constituted marriage.

In *Jolly* v. *McGregor* (3 Wilson and Shaw, 85) a marriage irregularly celebrated before a clergyman of the Established Church was declared null and void, because the Court was satisfied that the parties had no real matrimonial intention and never regarded the ceremony as binding.

Scotch people, it appears, have no fervent admiration of irregular marriages; the middle and upper classes would all object to such; it lowers them in the eyes of their friends and relatives.[2]

Marriage is perfected by mutual consent; and the law assumes as evidence of consent, the *sponsalia de præsenti* of the ancient Canon law, such as it was in practice before the Council of Trent (November 1563).[3]

In short, the law holds mutual consent to be proved by present declaration.

But, although this is now fully settled to be the law of

[1] Th. Cormier, *Le Code du très-chrétien et très-victorieux Roi de France et de Navarre, Henri IV*, p. 10 (Rouen, 1615). For further details on ancient French law, see E. Stocquart, *Aperçu de l'évolution juridique du mariage. Belgique Judiciaire*, 1902, p. 1117.

[2] *Rep. of Marriage Laws*, p. 5, 175.

[3] On ancient Canon law and the *sponsalia de præsenti*, see A. Esmein, *Le mariage en droit canonique*, I, p. 119, *et seq.*

Scotland, it is by no means generally admitted that it was always so. On the contrary, it is confidently maintained by some high authorities that this doctrine is a recent innovation, due, in great measure, to the decision of an English judge, Lord Stowell, in the celebrated case of *Dalrymple*.[1] According to the opinion expressed by Mr. F. Walton, it is thought that *Dalrymple* declared the ancient law of Scotland.[2]

A remarkable case was *Kennedy* v. *Campbell*. After the death of a man, called Campbell of Carrick, two women came forward, each claiming to be his widow. Kennedy relied on a private marriage contracted on the 3rd July, 1724, and Campbell on a marriage, also irregular, on the 9th December, 1725. It appeared, however, that the woman Kennedy had visited Campbell, while he was living with the respondent, his second wife, and had recognized her as his wife. The Court of Session, therefore, found that Kennedy had barred herself by personal exception from claiming to be Campbell of Carrick's wife.

But, in the House of Lords, this judgment was, in the year 1749, reversed, and the case was remitted with instructions to allow Kennedy a proof of her alleged marriage.

Kennedy's evidence included a written *de præsenti* declaration of marriage by Campbell, of 3rd July, 1724, and a great number of letters between her and the deceased, in which correspondence they treated each other as husband and wife.

However, the House of Lords, on the 31st January, 1753, affirming the judgment of the Court of Session, found that Kennedy had failed to prove her marriage (1 Paton, 519).

[1] For further details, see *Rep.*, p. xviii.

[2] Green's *Encyclop.*, v° *Marriage*, p. 260.

(*b*) *Marriage by promise subsequenta copula.*

In ancient French law, "*le mariage est réputé parfait et accompli, si, après les fiancailles, les parties ont eu cohabitation charnelle par ensemble.*" [1]

So in Scotch law, a presumption is raised that, at the moment of the *copula carnalis*, a present interchange of consent to be husband and wife, in performance of the previous promise, took place between the parties and therefore constitutes a lawful marriage, *ipsum matrimonium.*

This is the doctrine of the Canon law regarding the *sponsalia de futuro,* which was stated by Lord Stowell as follows: "If the parties, who had exchanged the promise, had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection." [2]

A mere *promise* of future marriage is of no greater force or effect than a similar promise in England, and mere carnal intercourse, without more, is in Scotland, as in England, concubinage, and not marriage.

Therefore the *copula* must be preceded by a *written* promise of future marriage, or by a promise, *afterwards confessed upon oath.* It cannot be proved by parole.

But a distinct promise in writing is not essential, if there is writing signed by the defender which amounts to an acknowledgment that promise has been given.

When the promise is proved or admitted, the *copula* may be proved *prout de jure.*

If there has been *copula* before the promise, it lies on the

[1] Thomas Cormier, *Le Code du très-chrétien et très-victorieux roi de France et de Navarre, Henri IV*, p. 7 (Rouen, 1615).

[2] *Dalrymple* (2 Hagg's Consist. Rep., 66).

pursuer to prove that a *copula* subsequent thereto was only granted on the faith of the promise.

The promise and the *copula* must both take place in Scotland, or at least in a country where this is a mode of constituting marriage.[1]

If of uncelebrated marriages, those by *sponsalia per verba de præsenti* do not seem to have been very frequent during the fifteenth century, the decreet-books of the Commissary Court of Edinburgh, during that period, are full of judgments sustaining the validity of marriages contracted *per verba de futuro subsequente copula*.[2]

"It is the actual ceremony, as well as the substance of the marriage; it is the conversion of the lover into the husband, *transit in matrimonium*, if it was not *matrimonium* before."[3] This is the practical description given by Lord Stowell, and it seems to be the summing up of the subject.

(c) *Marriage by habite and repute.*

The words "habite and repute" are past participles, equivalent to "held and reputed." The old phrase seems to have been: "*et tanquam conjuges fuerunt habiti, tenti et reputati.*"

The presumption rests on the Act 1503, c. 77, which provides that a woman who has been reputed during a man's lifetime to be his wife, shall be entitled to terce unless it is proved she was not married to him.

Such was the Canon law, according to which marriage could be proved by evidence that the woman bore the man's name, was treated by him as a wife and reputed to be such.

The cohabitation must be uniform and consistent. "A

[1] For authorities on those several points, see Green's *Encyclopædia*, v° *Marriage*, p. 265.

[2] J. Muirhead, *op. citat.*, p. 46.

[3] *Dalrymple* v. *Dalrymple*, *per* Lord Stowell.

man, without the least thought of marriage, may behave to his mistress as if she was his wife, may not choose to contradict her before strangers who call her such, nor to expose at all time the nature of the connection."[1]

But it is not merely cohabitation, it is more. The parties must be recognized by the family, by friends and by the world generally, as husband and wife, and then cohabitation is evidence of a prior marriage. Again, repute alone is insufficient, there must be cohabitation at bed and board as well.[2]

Cohabitation with habite and repute, however long continued, is not a presumption *juris et de jure*, it places the burden of proof on the side averring no marriage.

No period is fixed by law, but in all the cases hitherto where marriage has been declared, the cohabitation has extended over several years.

The cohabitation and repute must be in Scotland, or at least in a country where a marriage can be proved in this way and no ceremony is required for its constitution,[3] such as the State of New York.

Where there is an impediment to marriage at the commencement of the connection, for instance, one of the parties is already married and the impediment removed, there is a presumption that the connection continues to be illicit.

Repute must be undivided—D. had lived with M. as his mistress in a position about which there could be no question at all, and then took her home, where she lived in a kind of *divided* repute. The House of Lords held that, the repute being divided, and the connection having commenced in a concubinage about which there was no dispute, marriage was not constituted; it was held also that some clear change of relations was necessary.[4]

1 *In re Balbougie*, *per* Lord Glenlee (*Hume's Dict.*, p. 376).
2 *Lowrie* v. *Mercer* ([1840], 2 D. 961).
3 Green's *Encyclop.*, p. 266.
4 In re *Balbougie*, *Rep.*, p. 67.

But this presumption may be rebutted, for, though the intercourse began illicitly, even in adultery, as in the case of the Marquis of Breadalbane, yet, if there is afterwards a clear and undivided repute, that is sufficient to prove the marriage.

However, without some clear change, the growth of such repute is improbable. It is right to say that there is high authority for an opposite result.[1]

In England marriage may be held proved in this way, where the want of a record of the ceremony can be explained, for cohabitation as husband and wife in England is not evidence in all cases of a marriage. In case of indictment for bigamy, it is necessary to prove a marriage by a religious ceremony or acknowledgment before a registrar, living together as husband and wife would not be sufficient proof. This is probably the only distinction between the law of the two countries.[2]

During the eighteenth century, occurred in Scotland a number of cases which, in a remarkable degree, exhibited the mischievous consequences of irregular marriages from a moral point of view.

There was *Forbes* v. *The Countess of Strathmore,* in 1750, in which the *man* was the pursuer of a declarator of marriage. He had been footman to the Countess of Strathmore, and he alleged that marriage had been contracted between him and the Countess, in various ways, and among others by promise *de futuro subsequente copula.* This ground of action failed him, but he was allowed a proof of cohabitation, and habit and repute. The case does not appear afterwards to have come before the Court for judgment on the proof, but the marriage was recognised, the Countess apparently having abandoned her resistance.

[1] Evidence by the R. H. T. Moncrieff, *Rep.*, p. 63.

[2] Walton, *Husband and Wife*, p. 24; Green's *Encyclop.*, 266; *Rep.*, p. 140. In England, the burden of proof is held to be shifted, if it were proved that the woman with whom the man lived, and whom he had recognised as his wife, had been a prostitute (*Curran* v. *Lowe*, 1 Leigh Eccles. Rep., p. 630).

There seemed to be a notion afloat, some years ago, that, by the law of Scotland, a man gradually slides into marriage, by living for twenty years with a woman and recognizing her as his wife, going to church with her and sitting at table with her, where he speaks to her and treats her as his wife. There is not the slightest countenance for that notion in the Scotch law. If it be admitted that there never was the deliberate interchange of matrimonial consent, or if it be inferrred from the proved facts of a case that there was no such interchange of matrimonial consent, the length of cohabitation and repute is of no moment, and marriage will not be inferred therefrom.[1]

An important peerage trial is the *Breadalbane Case.* It turned upon the habit and repute of two persons as man and wife, and indirectly settled the succession to the title of the Earldom of Breadalbane upon the father of the present Marquis of Breadalbane. The ancestor of the late Earl had eloped with a married woman and had lived with her for several years before the death of her husband. It was proved, however, that she was received by the Breadalbane family as his wife subsequent to his death, and the judges by a majority decided in favour of her descendant.

Some ancient documents show that the constitution of marriage was based on a far different principle than is received in modern times, before and even after the Reformation. The sanction of a public officiary appears to have been an indispensable requisite.

[1] *Rep.*, p. 140.—There is much ignorance upon this important subject current on both sides of the border. The prevailing notion in England seems to be that every cockney tourist who sets out as a smart young or old bachelor, for the shooting season in the north, may return to his native land a sorrowful and unwilling husband, tied for life to some Scottish lassie with whom he has incautiously flirted. Even in Scotland there appears to be some wrong idea on the matrimonial contract. Every novel-reader will remember how ludicrously Wilkie Collins has misrepresented the Scottish law in his "MAN AND WIFE." The novelist's ideas as to what makes a valid marriage in Scotland are full of the greatest mistakes. (See F. Walton, *Scotch Marriages*, pp. 39—43.)

On the sixth of November, 1576, Isabel Carrou pursues Alexander Job, "for fulfilling of ane promeise of meriage allegit maid to hir *per verba de presenti* before *famouse* witnesses." The selection of this term shows that ordinary witnesses were not accounted sufficient.[1] To this the defender excepts that her libel was "not relevant wytout the promeise was made *per verba de presenti, in presence of any publict persone*," which the pursuer meets with the *single* reply, that it "is sufficient, seeing the witnesses are *eldaris*, and beires publict office." The only question was—since the sanction of a public officiary is admitted as necessary—whether an elder of the church could be held to be so. Far from stating that mere interchange of consent before ordinary or private witnesses constitutes lawful marriage, the doctrine of the pursuer as to publicity is admitted as an indisputed rule, and even the forms in question are sought to be completed by a ceremony *in facie ecclesiæ*.

The only occasions formerly, when proof of actual ceremony was dispensed with, were cases of parties cohabiting openly as man and wife, and being "habit and repute" such.[2]

Lord Brougham's Act, 1856.

An Act, 26 Geo. II, c. 33, introduced for the first time in England the principle that the marriage of a minor required the consent of the father or guardian; but it did not affect another principle of English law, by which a marriage between English subjects, validly performed in a foreign country, according to the law of that country, is valid in England. Scotland was for this purpose a foreign country; hence the popularity of "Gretna Green marriages," cele-

[1] The question as to the number and quality of the witnesses was an important one in old Canon law. "*Certains voulaient*," writes M. Esmein, "*que la fama jointe à la déposition d'un Seul témoin suffit à prouver le marriage, mais il semble bien qu'on exigeait alors que le témoin unique fut au dessus de tout soupçon*" (*Le Mariage en droit canonique*, Vol. I, p. 200).

[2] J. Riddell, *Tracts, Legal and Historical*, pp. 169, 222.

brated between runaway couples by a certain blacksmith, at a village just over the border.

"There exists," wrote Bentham, "a very singular custom in a country of Europe celebrated for the wisdom of its institutions. The consent of the father is necessary to a minor, *unless* the lovers can run a hundred miles without being caught. But if they are so lucky as to arrive at a certain village, and to procure at the moment some passer-by to pronounce a nuptial benediction, without any questions asked or answered, the marriage is valid and the father is ousted of his authority."

In order to put a stop to the Gretna-Green[1] and other similar marriages, an Act was passed on the 29th July, 1856, cited as *An Act for amending the Law of Marriage in Scotland* (19 & 20 Vict., c. 96); it is also called *Lord Brougham's Marriage Act.*

The Act provides that, after 31st October, 1856, "no irregular marriage contracted in Scotland by declaration, acknowledgment or ceremony, shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage."

It was held, in *In re Lawford* v. *Davies* ([1878], 4 P. D. 61), on the evidence of Scotch counsel as to the legal mode of computing time, that the statute had not been complied with, where the parties arrived in Edinburgh from England between five and six in the morning of 1st July, and were married at 11.30 on 21st July.

Marriage by promise *subsequente copula* does not appear to be covered by any of the words "declaration, acknowledg-

[1] The couples went to Gretna-Green, which is on the English side of the border, and walked across to the toll-house on the Scotch side. In 1847, the toll-keeper, a certain John Murray, was the person who celebrated those marriages. In the trial of *Black* v. *Smith*, he was declared to have a large practice. On Carlisle hiring day, he married 40 persons, and in a year, he generally married upwards of 400 couples.

ment or ceremony"; and if it had been intended to include this form of constituting marriage, some provision would naturally be expected as to whether the twenty-one days were to be before the promise or before the *copula*. But although the Act is spoken of as applicable to all irregular marriages by Lord Fraser,[1] it does not seem to apply to marriage proved by cohabitation, habit and repute. However, it is very unlikely that the Court would in any case hold a marriage proved in this way where the cohabitation in Scotland had been only for a few weeks.[2]

It was quite unnecessary for Scotch people to move from one part of Scotland to another—although some persons might have done so. Gretna Green marriages—when they did existed—were principally between English parties, and the Act prevented minors from evading the law in England by coming down and declaring the marriage within five minutes of their crossing the Scottish border.

It was stated in 1868, before the Royal Commission on the Law of Marriage, that the people of Scotland are in favour of the existing law, and that they do not apprehend any evil consequences to morality particularly to have arisen from what is considered in England the very lax state of the law in Scotland as to the contracting of marriage.[3]

The majority of the Scotch people object, it seems, to any change in the law, also because in the present state there can be no uncertainty as to the validity of a marriage in Scotland for want of compliance with form. The only ground of setting aside a marriage between parties not within the prohibited degrees is where bigamy has been committed by one of the parties. No law can be an absolute protection against that crime.

Nearly all the old statutes are directed against irregular marriages, against personating a clergyman, and against celebrated marriages without proclamation of banns.

[1] Fraser, i, 148. [2] Green's *Encyclop.*, p. 252. [3] *Rep.*, pp. 130, 144.

"Our practice," wrote Baron Hume, "bestows on all marriages of this description the name of clandestine and irregular, and holds none for right or inoffensive, but that which is celebrated by a priest duly ordained by the church, and after proclamation of banns."[1] The marriage is, however, valid, but the parties—the witnesses and celebrator—are liable to heavy penalties specified in the Acts 1661, c. 34, and 1698, c. 6. It is, however, doubtful whether those penalties could be exacted in such a case, if resisted.[2] There is no statute nullifying a marriage till we come to Lord Brougham's Marriage Act, which creates the first and only statutory nullity of marriage which occurs in any Act whatever applying to Scotland.

IV.—*Clandestine Marriage.*

By this term is now-a-days meant a marriage celebrated by a layman assuming the character of a clergyman, or by a clergyman without banns or certificate of notice.[3]

I.—There were a number of marriages—no less than eight—which were regarded as clandestines and inorderly down to the close of the seventeenth century, which are not so regarded now.

Were declared clandestine by statute:—

(1) A marriage celebrated by an Episcopal minister, when Presbytery was the established religion; this prohibition of marriage by an Episcopalian clergyman during the dominancy of Presbytery, continued till the passing of the Toleration Act, 10 Anne, c. 7, by which (sect. 5) Episcopal clergymen were allowed to celebrate marriage.

(2) A marriage celebrated by a Presbyterian minister, when Episcopacy was the established religion; that was between 1661 and 1690.

[1] Hume, *Treatise on Crimes*, Vol. I, p. 463; *Rep.*, p. 73.
[2] *Rep.*, p. 73. [3] F. Walton, *On Husband and Wife*, p. 16.

(3) A marriage celebrated by a Popish priest, or by any clergyman dissenting from the established church (other than Episcopalians). This law continued in force down to the year 1834, when an Act was passed, authorizing any clergyman to celebrate marriage (4 & 5 Will. IV, c. 28).

(4) A marriage celebrated without proclamation or banns, or by one who is not a minister of religion.

(5) A marriage celebrated by Scottish people elsewhere than in Scotland—where they have gone to England or other foreign parts merely to marry.

Were declared clandestine by ecclesiastical regulation or discipline :—

(1) A marriage celebrated on any day other than Sunday.
(2) A marriage celebrated not in church.
(3) A marriage without the consent of the parents.[1]

In the First Book of Discipline, in the year 1561, this passage occurs: "In a reformed Church, marriage ought not to be privately used, but in open space and presence of the Church. . . . . But in no ways can we allow marriage to be secretly used, how honourable soever the persons may be; and, therefore, Sunday before the noon, the most convenient time for celebration of marriage, and that it ought not to be used on any day else without the consent of the ministry."

In 1579, the same Assembly gave permission to celebrate marriage on a week day.[2]

In 1581, ministers were prohibited from celebrating marriages in private houses, under pain of destitution.

[1] J. Row, *The History of the Kirk of Scotland*, p. 27.

[2] "Bands being three severall Sondays lawfullie proclaimit, the marriage may be any day of the weik solemnizat, sua that ane sufficient number and witnesses be present." (*The Booke of the Universall Kirk of Scotland*, edited by A. Peterken, p. 192.)

See also, E. Friedberg, *Das Recht der Eheschliessung*, pp. 437, 438.

Finally in 1602, the Assembly "ordeaned that no marriages be celebrated earlie in the morning, or with candle-light; and finds likewise, that it is lawful to celebrate the bond of matrimonie upon a Sabbath-day, or any other preaching day, as the parties shall require."

There are instances recorded of clergymen being deprived from the office of minister for having celebrated marriages in private houses. In 1567, and again in 1587, there are such cases recorded.

In an action of bastardy in 1564, by William Crawfurd against his nephew, James Crawfurd, the pursuer contended that the marriage was clandestine, not being celebrated *in facie ecclesiæ*, but only in the house of the father.[1]

Before the Reformation, a private or clandestine marriage, between parties within the forbidden degrees, although ignorant of their relationship, certainly was null, and the children were illegitimate, without a possibility of the operation of *bonâ fides*, which, if marriage had been celebrated solemnly in church, would have availed. A presumption of *malâ fides* was induced from its secrecy and informality.[2]

The efforts of Scotch Parliament to suppress clandestine marriages never stopped. In 1672 it enacted that no

[1] *Acts and Decreets of the Commissary Court of Edinburgh*, under date 7th June, 1564.

[2] Those were the principles of old Canon law as applied all over Europe. They were illustrated in the case of Marguerite, daughter of Baldwin, count of Flanders, Emperor of Constantinople, and Bouchard d'Avesnes, in 1215. "Bouchard d'Avesnes avait épousé sa parente et sa pupille, Marguerite de Flandre, en lui laissant ignoré sa qualité de diacre. Plus tard l'empêchement fut divulgué, Bouchard frappé d'excommunication, et, en 1215, contraint de se séparer de Marguerite, dont il avait eu deux fils. Des commissaires, nommés par le Pape Innocent IV, après avoir constaté la bonne foi de Marguerite, la célébration solennelle et publique de son mariage, déclarèrent que ses fils étaient légitimes. Cette sentence fut confirmée par le pape." (E. Stocquart, "Les Origines de la sécularisation du mariage en France."—*Revue de l'Université de Bruxelles*, 1903, p. 435.

marriage celebrated by a person not lawfully ordained, or otherwise not authorised, should entitle the husband to his *jus mariti*, or the wife to her *jus relictæ*.[1]

In 1698, it was provided that persons clandestinely and irregularly married, contrary to the Act of 1661, should be obliged, under severe pecuniary penalties, to declare the names of the celebrator and witnesses. It enacted further that the celebrator should be liable to be summarily seised and imprisoned by a magistrate, and be punished with perpetual banishment and such pecuniary or corporal pains as the Privy Council should think fit. Also that the witnesses should be liable each of them, to a fine of £100 Scots, or corporal punishment in the case of their insolvency.[2]

II.—Since the Act 4 & 5 Will. IV, c. 28, any minister of religion can celebrate marriages, and only two of those different kinds of clandestinity have survived.[3]

According to Lord Fraser, if any Scotch people go to England and marry without having their banns proclaimed in Scotland, they commit an offence against the law and are liable to punishment under the Acts directed against clandestine marriages. But although the law is daily violated, there is no instance of a modern prosecution for entering into a clandestine marriage by marrying in England without previous proclamation of banns in Scotland.

ÉMILE STOCQUART.

[1] Stat. 1672, c. 9.

[2] Stat. 1698, c. 6.

[3] *Rep.*, p. 138.—Regarding clandestine marriages in France and in the greater part of continental Europe, late Professor Laurent remarks how effectually influence of modern State power has acted to suppress them : "*En Belgique et en France, il n'y a plus de mariages clandestins, l'action de la puissance civile a été plus efficace pour les extirper que l'intervention de l'Église.*" (*Droit civil international*, Vol. IV, p. 378.)

VI.—SOME DECISIONS UNDER THE COMPANIES ACTS 1862—1900.

IF the necessity for an Act is to be inferred from the number of cases decided under it, the much-abused Companies Act 1900 must be considered to possess far more justification for its existence than the Directors Liability Act 1890. The provision for registering debentures has alone led to "a crop of litigation" that, in either of the two years since the Companies Act 1900 came into existence, is far more bounteous than the jejune harvest of three cases which the research of Mr. Beaufort Palmer enables him to identify as the exclusive yield of the Directors Liability Act 1890.

It has been decided that a contract creating an option to call upon shares in a company is not illegal or *ultra vires* either of the company or of the directors (*In re South African Trust and Finance Co., ex parte Hirsch and Co.* ([1896], 74 L. T. Rep., p. 769), and that such option shares can be issued even in a winding up (*Hirsch and Co.* v. *Burns and Another* [1897], 77 L. T., p. 377). In a case brought under the Companies Act 1900, s. 8, that of *Burrows* v. *Matabele Gold Reefs Co.* ([1901], 2 Ch. 23), it was held that a company could not offer an option to underwriters to take further shares, as this involved an application of shares in payment of a commission for subscribing or agreeing to subscribe for shares of the company, and was therefore invalid under that provision. But the decision of the Court of Appeal in this case was not followed by the House of Lords in the subsequent case of *Hilder and Others* v. *Dexter* (71 L. J., Ch. 781), where it was held that a contract by which a company agreed to give certain persons, in consideration of their taking or underwriting its shares, an option at a future date to take further shares at par, did not involve an application of shares in

payment of commission for subscribing for shares within the Companies Act 1900, s. 8, subs. 2, and was therefore not illegal. The object of the action was to restrain the directors from carrying out the company's contract. There was no reason to doubt the good faith of the directors, or to suppose they were acting *ultra vires.* Lord Davey said the question before the House turned on the construction of the words in C. A. 1900, s. 8, subs. 2. In *Burrows* v. *Matabele Gold Reefs Co.* (*ibid, supra*), Rigby, L.J., said that the only question to be considered in that case was "the effect and meaning" of the same subsection, styled "a general prohibitive clause" by Farwell, J., in the Court below ([1901], 2 Ch. 33 and 26). Lord Davey considered the words "no company shall apply any of its shares or capital money" to naturally mean "apply its capital either in the form of shares or in the form of money derived from the issue of its shares" (71 L. J., Ch., at p. 784), and the words "in payment of any commission, discount or allowance," Lord Davey considered as equivalent "to payment by the Company" (*ibid*). The words "discount or allowance" are synonymous terms, meaning in both cases "a rebate on what would justly be due from the subscriber on his shares." The grounds on which Lord Davey allowed the appeal in this case were, (1) that the optional shares were not issued at a discount or allowance, "because the appellant had to pay the full nominal value"; if he exercised his option he would have "to pay twenty shillings in the pound for every pound share." (2) There was no commission paid by the Company, "for the Company will not part with any portion of its nominal capital which is received by it intact, or indeed with any moneys belonging to it" (*ibid, supra,* at p. 784). The next question Lord Davey considered was the argument of the respondent that the chance of the optional shares going to a premium gives the option holder a possible benefit at the expense of the

Company. It was this argument that seems to have convinced the Court of Appeal in *Burrows* v. *Matabele Gold Reefs Co.* (*ibid, supra*). Rigby, L.J., observed that he could see nothing in the general prohibitive subsection "about the nominal value of the shares," saying, "when you allot the shares you apply, not their nominal value, but the shares;" "a share is worth to the Company what it will bring" (*Burrows* v. *Matabele Gold Reefs Co.* ([1901], 2 Ch., at p. 34). But in the more recent case a totally different view was taken of the value of an optional share. Lord Davey considered that the future value of a share was only conjectural. Lord Brampton calling the entire transaction "a pure speculation" (4 L. J., Ch., at p. 786). Lord Davey concluded if full nominal value of the optional share was stipulated for, the benefit derived by the option holder was not at the expense of the nominal capital of the Company. Even when shares are actually at a premium in *præsenti* and not in *futuro*, Lord Davey said, "I am not aware of any law which obliges a company to issue its share above par because they are saleable at a premium in the market" (*ibid*, 784). On this view it is curious to note the validity of the original underwriting agreement, *Burrows* v. *Matabele Gold Reefs Co.*, might be upheld. But Lord Brampton seemed to consider this a ground for impeaching the validity of that agreement in *Hilder* v. *Dexter*. It is a question for directors to decide whether they will issue shares above par, and their conclusion must be guided by circumstances. Lord Davey derived satisfaction from the reflection that the decision he was compelled to give in *Hilder* v. *Dexter* (*ibid, supra*) leaves things as they were before the Act of 1900, since that decision did not extend the general prohibitive clause "of the eighth section of that Act" to transactions which were legitimate before the Act of 1900. The law on the subject of issuing shares at a discount, and the payment of commission to underwriters was, previous to the

Companies Act 1900, contained in the two cases of *Ooregum Gold Mining Co.* v. *Roper* ([1892], A. C. 125), and *Metropolitan Coal Consumers Association* v. *Scrimgeour* ([1895], 73 L. T. Rep. 137). *Ooregum Gold Mining Co.* v. *Roper* is considered by Mr. Beaufort Palmer, in his *Company Law*, to be one of the leading cases in Company law (*Company Law*, p. 349).

Mr. Palmer states the effect of this decision to be that "it is *ultra vires* for a company under the Companies Acts to issue its shares at a discount, that is to say, on the footing that the holders shall have paid-up shares on payment of less than the nominal value of such shares" (*ibid*, p. 56). In this case, therefore, the value of a share to the company was its nominal value. But it is this view of the value of a share to the company that was taken by Lord Davey in *Hilder* v. *Dexter* (*ibid*, *supra*), and it is on this ground that it is possible to make a sharp distinction between the view of the House of Lords in that case and the previous decision of the Court of Appeal in *Burrows* v. *Matabele Gold Reefs Co.* (*ibid*, *supra*). The possibly wide distinction between the nominal value of a share and its market value being the rationale of the difference between the two decisions, would seem to warrant the inference that *Burrows* v. *Matabele Gold Reefs Co.* must be considered overruled. But the last case was not even referred to by Lord Davey in *Hilder* v. *Dexter*, and Lord Brampton considered the two cases were to be materially distinguished, on the ground that in the earlier case the optional shares were allotted at a price below the then market premium value, while in *Hilder* v. *Dexter* the price of the optional shares was equal to the market price of the company's shares at the date of the contract for the options. It is submitted that, in *Burrows* v. *Matabele Gold Reefs Co.*, the guarantors and the company agreed to raise the option price to the then market price, which had risen unexpectedly a fortnight before the action was brought ([1901], 2 Ch., pp. 25–6).

The case of *Stephens* v. *Mysore Reefs (Kangundy) Co.* ([1902], 86 L. T. Rep. 221) decided that the first clause of the memorandum of association exclusively defines the primary object of a company, and that, consequently, where it stated that the object of a company was to conduct gold-mining operations in Mysore, it was *ultra vires* of the company to obtain an option on mining property in West Africa. In this case the plaintiff (a holder of both preference and ordinary shares) brought an action for injunction to restrain the defendant company from acquiring the option or mining property in West Africa, on the ground that such proceeding was *ultra vires* of the company. Eady, J., held that as the primary object of the company was to take over the undertaking in Mysore, the proposed course was *ultra vires*, and must be restrained by injunction. The Court considered "that every line" of the Judgment of Lord Lindley (then Lindley, L.J.), in *In re German Date Coffee Co.* ([1882], 46 L. T. Rep. 327), was "applicable" to the case. Lord Lindley there said: "Care must be taken to construe general words in a memorandum of association so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do, under general words, to turn a company for manufacturing one thing into a company for importing something else." This dictum of Lord Lindley constitutes an apt commentary on the maxim, *quod dolosus versatur in generalibus*. In *Stephens* v. *Mysore Reefs, etc. (ubi, supra)*, Eady, J., delivered the following dicta:—(1) A liberal construction ought to be given to subsidiary clauses in the memorandum of association, even when they confer full and ample powers in aid of the main object. But a construction of the memorandum ought not to be accepted which "enables the company to carry on every possible kind of business." (2) The function

of stating the primary object is confined to the first clause of the memorandum of association. (3) A company may have more than one object, but its objects must be set forth "in reasonably clear terms, so as to satisfy the Companies Act 1862, s. 8." (4) "A subsequent clause in the memorandum of association cannot have such a wide effect as to make every precedent clause a separate object of the company" (*ibid, supra*, p. 222).

The case of *In re Fenwick, Stobart and Co., Deep Sea Fishery Company's Claim* ([1902], 86 L. T. Rep. 193), decided that when notice of the dishonour of a bill of exchange is given to the secretary of a company it does not constitute notice to another company, of which he is also secretary, unless it comes to him under circumstances which make it his duty to communicate it. The mere existence of "the common relationship" to two companies imposes no common duty to communicate; it depends on the circumstances of the particular case. In this case Buckley, J., pointed out that information might come to a person who stood in the common relation of "secretary to two companies under such circumstances" as that it involves "a breach of his duty to the one company to communicate it to the other." In this case it was not the secretary's duty to communicate the notice of the dishonour of the bill of exchange. Unless the business of a company is such that it cannot be carried on in the ordinary way without the use of bills of exchange, the directors, *primâ facie*, have not got the power to draw, accept, or indorse bills in the name and on behalf of the company (*cf. Lindley on Companies*, pp. 242–3). "Whether directors, secretaries, or managers of companies have implied power to bind the companies to which they belong by bills of exchange and promissory notes, depends partly on the statutes relating to the privileges of the Bank of England. But where these statutes do not apply, the power depends on the nature of the company" (*ibid*,

supra, p. 242). "The cases appear to go to this, that a corporation may issue bills where the terms of the instrument under which it is constituted authorize, upon a fair construction, the issuing bills, or where the business of the corporation is one which cannot, in its ordinary course, be carried on without bills (Buckley: *The Companies Acts*, p. 212). *George Whitechurch, Ltd.* v. *Cavanagh* ([1901], 85 L. T. Rep. 349; [1902], A.C. 117) constitutes a curious instance of a case where a person, who stood in the "common relationship" of secretary to a private individual, and also to a limited company, acquired information as secretary to the private person under such circumstances, as that, to quote the language of Buckley, J., in *In re Fenwick, Stobart and Co.*, it was his duty to communicate it to the company. The information in this case was a proposed fraud on the company, but the evidence showed that, so far from communicating it, the secretary lent himself to a fraud perpetrated by the person to whom he was secretary on the company, to whom he also stood in that relation. This, however, from the point of view of Company law, was a minor point. A leading case in law is as synthetic as an early type in palæontology, and the learning of *George Whitechurch, Ltd.* v. *Cavanagh* ranges over such extensive topics as the law of estoppel, the function of a managing director, and those of a secretary of a limited company, the essential difference between a certification transfer and the certificate of shares under the seal of the Company made *primâ facie* evidence of title by the Companies Act 1862, s. 31, and the meaning of "protective seizure" in French law. But "the real question may be stated very shortly—Has the appellant Company, George Whitechurch, Ltd., incurred any, and if any, what liability by reason of representations made by its secretary and by its managing director?" (*per* Lord Macnaghten in *George Whitechurch, Ltd.* v. *Cavanagh*, 85 T. L. Rep., at p. 351). The secretary

of the company, in order to assist a shareholder in carrying out a fraud, falsely certified that certificates of shares had been deposited with him to meet certain transfers, when in fact no such certificates had been deposited. The House of Lords decided that the company were not thereby estopped from denying the right of the proposed transferee to be put upon the register of shareholders. *Grant* v. *Norway* (10 C. B. 665) followed, Lord Robertson doubting on this point. The representations of the secretary were in writing and in a common form, and there could be no doubt as to the meaning of his words. The certification transfer the secretary gave ran as follows: "Coupon for preference shares in the Company's office, George Whitechurch, Ltd. (Signed) A. B., Secretary." One in similar form was also given by him for "Y" ordinary shares. Lord James of Hereford considered that, in a certification transfer, the word "coupon" is identical in meaning with "certificate" of shares. A certification transfer "is a receipt of certificates," not the share certificates themselves. Lord Brampton observed that "a transfer certification appears in the margin of the transfers" (*ibid, supra*, at p. 355): it is said to be "in order" or "all right" when signed by the secretary, and the rubber stamp of the company's name is usually used.

A certification transfer amounts, at the most, to a "reasonable assurance" to a transferee that "the transferor has or will have the power to make a good title to the shares when the necessity arises" (*per* Lord Brampton, *ibid, supra*, p. 355). A certification transfer is no warranty of title (*cf. Bishop* v. *Balkis Consolidated Co.*, 63 L. T. Rep. 601; 25 Q. B. Div. 512); it is never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the Board. Lord Macnaghten observed that a certification transfer is required to meet the

exigencies of business in the Stock Exchange; "it is really out of place in dealings in shares not under the rules of the Stock Exchange" (*George Whitechurch, Ltd.* v. *Cavanagh* [1901], 85 L. T., at p. 352). A certification transfer, finally, is not recognised at all by the Companies Acts, it is not even mentioned in Articles of Association, and its deposit does not form a good equitable charge such as can be created by the deposit of share certificates. This summary of the effect and meaning of "a certification transfer" renders it very easy to understand the decision arrived at by the House of Lords in *George Whitechurch, Ltd.* v. *Cavanagh*, that the company was not estopped by certification transfers of its secretary, constituting receipts for certificates which had never been lodged with him. Lord Macnaghten, at the close of his judgment, observed that "no one could believe that any board of directors would alter the register of their shareholders on the faith of a certified transfer without the production and cancellation of the old certificate" (*George Whitechurch, Ltd.* v. *Cavanagh* [1901], 85 L. T. at p. 353). In *Grant* v. *Norway* (10 C. B. 665), it was held that a shipowner is not bound by bills of lading signed by the master for goods not received on board. The majority of the House of Lords, in *George Whitechurch, Ltd.* v. *Cavanagh*, considered that the effect of certification transfers signed by the secretary for certificates which were never actually lodged in the office, is exactly the same as a bill of lading given under the circumstances that were in evidence in *Grant* v. *Norway*. Lord Robertson, on the other hand, considered that the decision in *Grant* v. *Norway* ([1851], 10 C. B. 665), was confined to law about shipmasters and bills of lading, and did not represent the general law.

By the law of Principal and Agent, Lord Robertson considered the company was estopped by the written representation of the secretary in the certification transfers. Lord Macnaghten pointed out that "the duties of a company's

secretary are well understood; they are of a limited and somewhat humble character" (85 L. T. Rep., at p. 351). "A secretary," said Lord Esher, M.R., "is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all" (*Barnett & Co.* v. *South London Tramways Co.*, 57 L. T. Rep. 436). Even if a secretary is considered an agent and not a servant, it was pointed out by Lord James of Hereford, in *George Whitechurch* v. *Cavanagh*, "a secretary of a company who acknowledges the receipt of certificates which were never in his hands, is doing that which his principals never intended or authorised him to do, and an act which is quite outside and beyond his agency, either express or implied" (*ibid*, 85 L. T., at p. 354). In his luminous observations on the liability of a principal for the wrongful act of a servant fraudulently committed, Lord Brampton cited a passage from Lord Bowen's Judgment (then Bowen, L.J.), in *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (18 Q. B. D., at p. 717), where the latter pointed out that except in the overruled case of *Swift* v. *Winterbotham* (28 L. T. Rep. 339; L. R. 8, Q. B. 244), I am aware of no precedent for holding that a principal is liable in an action for deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. In *George Whitechurch, Ltd.* v. *Cavanagh*, Lord Brampton declared, that the finding of the jury that the secretary committed the fraud for the benefit of the company was incomprehensible, adding: "there was not, in my opinion, a scintilla of evidence to support it." It is clear also, from the Judgment of Lord James of Hereford in that case, that he considered the secretary acted in no way for the benefit of the company. The alleged estoppel arising from the representations of the managing director in *George Whitechurch, Ltd.*, arose from his comment on the

certification transfer, made in the presence of the intended transferee and his solicitor: "I shall be quite satisfied if it is the secretary of the company's signature." It was necessary, Lord Macnaghten observed, to keep the two alleged estoppels distinct and deal with them separately. The oral promise of the managing director about the certification transfer was clearly a totally different thing from the written words of the secretary on the certification transfer itself. In *George Whitechurch, Ltd.* v. *Cavanagh*, Lord James of Hereford observed that "there was no intention (on the part of the managing director) to deceive the respondent or to cause him to rely on a supposed state of facts which did not exist" (*ibid*, 85 L. T. Rep., at p. 354). The House of Lords was unanimous in considering, in the words of Lord Robertson, "that the case as to the representations by the managing director entirely breaks down," so that the company could not be estopped by it. It was considered by the House of Lords that the managing director in the promise referred to (*supra*) "represented that the Company or board of directors would act on the certified transfers without requiring any more." But "that is not a representation of an existing fact. If it is anything it is a promise *de futuro*, which cannot be an estoppel" (*per* Lord Macnaghten in *George Whitechurch, Ltd.* v. *Cavanagh*, 85 L. T., at p. 353). Lord James of Hereford regarded the promise of the managing director as "an expression of opinion," and not a representation of a non-existent fact, and therefore no estoppel (*ibid*, p. 354). Lord Robertson observed: "There is no estoppel unless the managing director's now averring the truth about the shares in question would work some wrong to the transferee" (*ibid*, p. 354). Lord Brampton considered that no estoppel arose on the managing director's statement, because the appellant's solicitor at the interview had not mentioned to the managing director "the curious fact" that the principal

perpetrator of the fraud had previously broken his promise to give him (the appellant's solicitor) the share certificates requisite. In this case the managing director would have detected the fraud, and would not have declared he would have been satisfied with the signature of the secretary to the certification transfer if that fact had been mentioned. "But," Lord Brampton continued, "in my judgment, no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such, and if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate to seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel" (*Ibid*, at p. 358). The appellant's solicitor's knowledge of the fact that the instigator of the fraud had already made default in the delivery to the appellant of the share certificates, and the circumstance that he did not communicate this fact to the managing director, amounted to something which, to use the words of Lord Brampton, "if revealed, would have been calculated to influence 'the managing director,' and which would have caused him to hesitate before speaking positively." Another ground of the ruling of the House of Lords in rejecting the statement of the managing director was that it was *ultra vires*. "A managing director, even if he has very extensive powers conferred on him by the Articles of Association, is only agent of the Company for the carrying on of its commercial business, and is not an agent for the transfer of its shares" (*per* Lord James of Hereford, in *George Whitechurch, Ltd.* v. *Cavanagh*, 85 L. T. Rep., at p. 334). "The great power given to a managing director is confined only to the commercial business of a company. But the sale, purchase, or transfer and acceptance of shares

cannot be treated as any part of the commercial business of a company" (*per* Lord Brampton, *ibid*, *supra*, at p. 357).

The elaborate review of the learning of estoppel given by Lord Brampton, in *George Whitechurch, Ltd.* v. *Cavanagh*, and the authorities he cited or referred to, may be thus summarised:—(1) "Estoppel is not a cause of action; it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself:" (*per* Lord Lindley, then Lindley, L.J., in *Low* v. *Bouverie* [1891], 65 L. T. Rep., at p. 537). (2) Estoppel was, before the Judicature Acts 1873 and 1875, considered "a more proper subject for equity than law, at least there is a concurrent jurisdiction" (*Burrowes* v. *Lock* [1805], 10 Ves. 470). (3) Cases of estoppel must be distinguished from cases of fraud. "Relief will also be given at law and in equity, even though the representation were innocently made without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation" (*per* Kay, L.J., in *Low* v. *Bouverie*, 65 L. T. Rep., at p. 541). The difference between an action for deceit and a case of estoppel is, that the plaintiff in an action for deceit relies on the falsehood of the statement, and has to prove that it was made fraudulently, while in the case of estoppel the plaintiff relies on the mere fact of the statement. *Derry* v. *Peek* ([1889], 61 L. T. Rep., 265), very well illustrates the difference. That was a case of an action by a person who had been induced to take shares in a joint stock company by an untrue statement in a prospectus. The action was brought against the directors who had issued the prospectus. The statement was not fraudulently made. The plaintiff could not rely on estoppel, because he could not prevent the directors from denying the truth of their representation. The plaintiff could not succeed on the ground of fraud, because he could not prove the statement was made fraudulently.

(4) "The doctrine of estoppel is not applicable to cases where the representation is a contract or promise, but is strictly confined to cases where the statement is of an existing fact" (*per* Lord Bowen, then Bowen, L.J., in *Low* v. *Bouverie* [1891], 65 L. T. Rep., at p. 539). "I have always understood that a representation to bind anybody as an estoppel must be a representation of an existing fact, or rather a representation as to some fact alleged to be in existence, and not to promises *de futuro*" (*per* Lord Macnaghten, in *George Whitechurch, Ltd.* v. *Cavanagh*, 85 L. T. Rep., at p. 352). (5) "To support an estoppel the evidence ought to be clear and unambiguous" (*per* Lord Lindley, then Lindley, L.J., in *Low* v. *Bouverie*, 65 L. T. Rep. 533). "The language upon which an estoppel is founded must be precise and unambiguous; but that does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed" (*per* Lord Bowen, then Bowen, L.J., in *Low* v. *Bouverie*, 62 L. T. Rep., at p. 539). (6) "It is an essential element in cases of estoppel (as is clearly expressed in the case of *Carr* v. *London and North Western Railway Co.*, 31 L. T. Rep. 785), that the person to whom the representation was made has suffered loss by acting on it; or, to put it in another way, has altered his position to his detriment by acting on the representation" (*per* Lord Robertson, in *George Whitechurch, Ltd.* v. *Cavanagh*, *ubi supra*). Lord Macnaghten said that "the doctrine of estoppel is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in the case of *Carr* v. *London and North Western Railway Co.* (31 L. T. Rep. 785; L. R., 10 C. P. 307). Perhaps some of the difficulties which have gathered round the present case have

come from clinging to rules rather than attending to principles" (*ibid, supra*, p. 353). In "an obvious case of estoppel," *Pigott* v. *Stratton* (1 L. T. Rep., N. S., 111; De G., F. & J., p. 33), Lord Campbell said, "I apprehend that the injunction is to be supported on the well-established doctrine that if A. deliberately makes an assertion to B. and it is acted upon by B., A. is estopped from saying that it was not true. If it turns out to be false, A. is answerable for the damage which may have accrued to B. for having acted upon it, and B. is entitled in respect of anything done in the belief that it was true, to object to any denial of its truth by A. This doctrine is to be found in *Pickard* v. *Sears*, and a series of subsequent decisions."

(To be continued.)

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

British Fiscal Relations.

IN view of the proposed inquiry into the fiscal relations of the United Kingdom with other countries, it may be useful to recall the nature of the existing commercial treaties to which we are parties. Of these, far the largest number contain mutual concessions of most favoured nation treatment, and reciprocal freedom of commerce, and equality of import duties with those imposed on the goods of "any other foreign country" or "any third country." Such are our treaties with Austria (1876 and 1877), Argentina (1825 and 1849), Bolivia (1840), Bulgaria (1897, being bound by the Treaty of Berlin, 1878, to treat all subjects of the Powers parties thereto on the same trade footing), Columbia (1866), Costa Rica (1849), Denmark (1824), Egypt (1889), France (1882), Greece (1837, only giving most favoured nation treatment to Greeks in trade with British East Indies), Honduras (1887, with exception in favour of Central American Republics), Guatemala (1849), Italy (1883, any

difficulties to be settled by arbitration), Japan (1894), Liberia (1848), Mexico (1888, with arbitration clause as above), Montenegro (1882 prolonged 1900), Morocco (1856), Netherlands (1837 and 1851), Nicaraguà (1868), Paraguay (1884), Persia (1841 and 1857, most favoured nation treatment of any European nation), Peru (1850, most favoured nation treatment gratuitous or conditional), Roumania (1892), Russia (1859, exception in favour of trade between Finland and Norway), Salvador (1862, twenty years from 1886), Servia (1893, exception in favour of frade with neighbouring States), Spain (1893, most favoured nation treatment of any European State except Portugal), Sweden and Norway (1826), Switzerland (1855), Tunis (1897), United States (1815, 1818, 1827, 1892), Uruguay (1888 and 1889, exception in favour of Brazil, Argentina, or Paraguay), Venezuela (1834).

With some countries the same result is obtained by municipal law, instead of as before by treaty; such as Germany (1865, now 1898), except that in the Western Pacific there is secured by treaty reciprocal freedom of commerce and trade between the British and German protectorates and possessions; Ecuador (1880, now 1900, which grants most favoured nation treatment "only on the basis of the strictest reciprocity").

We had similar treaties with Chile (1854, denounced 1897), San Domingo (1850, denounced 1896), Brazil (1827, expired 1844), Portugal (1842 and 1882, denounced 1891); and with Belgium (1862, treaty denounced in 1891) we have a commercial *modus vivendi* on the same terms, or basis of reciprocity.

The following countries give us most favoured nation privileges but do not ask for it from us: Abyssinia (1849 and 1897), China (1842, 1858, 1860, 1893 Burmah), Congo State (1884), supplemented by Berlin Central Africa Convention (1885), Corea (1883), Muskat (1839 and 1891), Siam (1855), Turkey (1675 and 1861). These treaties are generally all terminable at a year's notice.

The fiscal relations of the Crown Colonies follow those of the United Kingdom; the self governing colonies can take advantage of the treaties between Great Britain and the following countries by express provision :—

Abyssinia (1897).—Colonies have most favoured nation treatment as regards imports and local taxation.

Belgium.—Commercial *modi vivendi* on lines of 1862 treaty have been concluded with India, Malta, Cyprus, Newfoundland, Ceylon, Lagos, Queensland (1898 and 1899); the 1862 treaty was denounced by us because it provided that Belgian goods should not be dutied in the Colonies more highly than British goods.

Bulgaria.—All British Colonies, so far as their laws permit, included, unless they give contrary notice in six months.

Ecuador.—(1880 treaty now gone, to which all Colonies, except Canada, New South Wales, Victoria, and Tasmania, had acceded.)

Egypt (1889).—Newfoundland, Tasmania, Queensland, Natal, and New Zealand have acceded; while Cape Colony, Canada, New South Wales, South Australia, and Victoria have not.

Germany.—1898 law gives all British dominions, except Canada, most favoured nation treatment.

France has an arrangement with Canada (1893) which grants France and French colonies most favoured nation treatment in tariff matters.

Mexico (1888).—Newfoundland, Victoria, West Australia, Tasmania, South Australia, and Queensland and Natal are parties: India, Cape Colony, New Zealand and New South Wales are not.

Montenegro (1882 prolonged 1900).—Colonies may accede if they like.

Muskat (1891).—Self-governing colonies can accede, and Cape Colony, Victoria, Tasmania, West Australia, New Zealand, New South Wales, and South Australia have acceded.

Paraguay (1884).—All colonies have acceded.

Roumania (1892).—Newfoundland, Tasmania, Natal, Queensland, and South Australia have acceded.

Servia (1893).—Natal, Newfoundland, Queensland, Victoria, and India have acceded.

Spain.—British Colonies have minimum tariff enforced against them.

By the Brussels Sugar Convention, 1902, Great Britain has bound herself, but with a "reservation in principle of full liberty of action as regards British implied fiscal relations," not to grant bounties on Crown Colony sugars, and as to the self-governing colonies not to grant preference to Colonial sugars as against sugars from any party to the Convention; but the self-governing Colonies have declined to accede to the Convention.

Uruguay.—All Colonies except India, Victoria, New Zealand, South Australia, New South Wales, acceded to the old denounced treaty, and could accede to 1899 treaty within six months of ratification.

France and the United States have treaties with us as to Zanzibar (1901 and 1902).

In many treaties British goods are subjected to fixed tariffs, *e.g.*, Bulgaria, 10 per cent. duty on imports; China, same; Montenegro, 8 per cent. on same; Morocco, 10 per cent.; Egypt, 10 per cent.; Spain, above; Greece, tariff modified in 1890.

Mr. Chamberlain, at the Conference of Colonial Premiers in London in 1897, declared that none of these treaties (now that the Belgian and German ones are gone) will prevent Great Britain making a change in her fiscal relations with her Colonies, the most favoured nation clause only applying to foreign nations, except perhaps the Sugar Bounties Convention; but if any colony offered preferential terms to any foreign country, then any other nation enjoying most favoured nation treatment from us could demand the same.

In connection with this last Convention, which is to come into force on September 1st, the Permanent Commission charged with the duty of examining the various national customs legislations with regard to home and foreign sugar seems to have already decided that the Austro-Hungarian "contingent" system, the object of which is to reserve to Austria and Hungary, who were separate contracting parties to the Convention, each its internal market by fixing a certain quantity of sugar as that to be treated as manufactured for the home market, and allotting to each manufacturer therein a fixed proportion thereof, constitutes an indirect bounty on the production or export of sugar. It is also reported from Brussels (*Times*, June 23rd) that the Commissioners have determined that the non-contracting parties have not modified their previous legislation, and that Denmark, Japan, and Russia are liable therefore to have countervailing duties placed on their sugar.

Venezuela.

Dr. Gustav Sieveking, Rechtsanwalt, Hamburg has kindly given the following information as to the provisions of German law on the point dealt with in the last number of this Magazine (Vol. XXVIII, 340—343):—

(1) Every creditor can arrest any property of his debtor, irrespective of the other creditors. In urgent cases he may even arrest the property before having a judgment, but in such a case he is bound to bring an action within a certain period of time, if required by the debtor. This right is subject to two restrictions—

(*a*) Indispensable property cannot be arrested.

(*b*) No arrest is allowed as soon as insolvency is declared.

(2) The creditor, who has arrested property of his debtor, has a priority in payment before the other creditors who have taken no such steps; *i.e.*, he has a priority as regards

the proceeds of the arrested property. The debtor is thereby not prevented from paying another creditor.

(3) Any lien on the property seized takes priority over the arresting creditor, if constituted before the arrest is effected.

Servia.

The tragic death of the King and Queen of Servia has not unnaturally called forth expressions of horror at a crime which modern sentiment must regard as barbarous and unnecessary, and it has, no doubt, caused several of the Powers to withdraw their representatives from the Servian Court as a protest. The position thus created at Belgrade, so far as Great Britain is concerned, has been defined, in answer to an inquiry in Parliament, to be that the functions of the British Minister as British Representative are suspended so that he would reside at Belgrade privately as unofficial British Agent, the British Consul taking charge in his place, but having no ex-territorial privileges; but the Legation, according to custom, retains its ex-territorial and diplomatic privileges and its duties towards British subjects, and is authorized to make the necessary unofficial communications to the *de facto* authorities. In London the functions of the Servian Minister ceased with the death of the Sovereign who accredited him to England. This position, however, does not differ from that created by the death, abdication, or dethronement of a Sovereign who accredits a minister to another State, or by the death of the Sovereign of the latter. The minister must be re-accredited, whatever the cause of the cessation of diplomatic relations, though where it is certain that his mission is only suspended temporarily it is usual to continue business with him *spe rati* (Phillimore, *Int. Law*, ii, 232). From the point of view of International law, it is to be hoped that this state of things will not

be continued longer than is necessary to satisfy our Government that the new Sovereign of Servia is constitutionally recognized in that country as the *de facto* and *de jure* Sovereign: otherwise, we should be laying ourselves open to the charge of infringing the wholesome rule against seeking to interfere in the internal affairs of an independent State. In our own case the execution of King Charles I, in that of France that of King Louis XVI, and in that of Russia the murder of the Czar Paul, have all been instances of revolutionary acts in the internal history of the country, which, nevertheless, other countries did not treat as grounds giving them any right to interfere. Nor can it be said that the position of Servia, as being practically a State newly created by the Powers of Europe, justifies any of those Powers in bringing pressure on her in a matter of internal concern. Though, by the Treaty of Paris of 1856, Servia, then a principality, was placed under the collective guarantee of England, France, Russia, Sardinia, and Turkey, its separate nationality had been recognised in 1826 by the Treaty of Ackerman, it had become acknowledged as a distinct and independent nation governed by a native prince before the Balkan War of 1878, and by the Treaty of Berlin its sovereignty was assumed and its dignity increased by accession of territory, though it was at the same time restricted in various ways, *e.g.*, bound itself to allow general religious toleration in its territory. The guarantee of the Powers placed it on the same footing as Greece or Belgium, and does not affect its sovereignty; and the view of this revolution, attributed to the French Foreign Minister, that it was painful but was internal only to Servia is unexceptionable.

Jurisdiction.

Several recent cases have shown the boundaries of jurisdiction observed by our Courts. In *Kelchman* v. *Meurice*

([1903], 19 Times L. R. 254), a judgment had been obtained in the King's Bench against a defendant, who was out of the jurisdiction and was resident in Paris, and a charging order on shares in an English company was obtained. The Court, however, refused to enforce this order by allowing the shares to be sold: and, pending appeal, as an alternative remedy the plaintiff began a fresh action in the Chancery Division claiming to have an account taken of what was done under the charging order, and to have the charging order enforced by sale. The Chancery Court refused to give leave for the writ to be served out of the jurisdiction, not accepting the contention that the action on the judgment was for breach of contract because action of debt lies on a judgment (Order XI, s. 1 (e)): and on appeal both the judgments have been upheld.

In *Clinton's Case* (19 Times L. R., 181), the Chancery Division has held that the Court could exercise jurisdiction in a case involving the title to land situated in a British Colony, where a testator had left a mixed succession of realty and personalty situate in the Colony upon the same trusts in the administration of which the assistance of the Court was sought; but in ordering the case to go to trial, the Court declared that as regards any real property which had devolved direct upon the heir-at-law his rights should not be affected.

Domicil.

In *Lowenfeld* v. *Lowenfeld* a case where a husband respondent in a divorce cause pleaded that his domicil was Austrian, and that a competent Austrian Court had dissolved the marriage, and he had since married again, and the wife petitioner contended that his domicil was English and the Austrian Court was incompetent, the Court ordered

that the question of domicil should be tried by a special jury as a question of fact, and the decision of the Court has been upheld on appeal.[1] There are, of course, presumptions of law in questions of domicil, but it always remains ultimately a question of fact; and as such should be tried by a jury, even though the Court, as in this case, thinks it might be more convenient if it tried this issue itself (Divorce Act 1857, ss. 28, 36). By the Probate Act 1858 (21 & 22 Vict., 56), relating to Scotland, the "interlocutor" (judgment) of a Commissary that a deceased person who dies in Scotland was domiciled there is conclusive evidence of the fact of such domicil for the purpose of including in the inventory of his personal estate and effects there, any personal estate of the deceased situate in England or Ireland; but this finding has no effect for determining any issues raised in the English Court of Probate which will try them, though the Scottish confirmation of the will is tendered here for the seal of the Court. (*Hawarden* v. *Dunlop* [1861], 31 L. J., P. and M. 17; Powles v. Oakley, *Probate* 194). Another statute relating to domicile is that of 1861 (24 & 25 Vict., 121), by which England and foreign States may enter into special conventions *inter se* that their respective subjects dying in the other State's territory shall not be deemed to have acquired a domicile there, unless they have been resident there for a year immediately before death, and have expressed a wish in due form and writing to become domiciled there: but no advantage seems to have been taken of this.

Conflict of Law.

In *Kaufman* v. *Gerson* (W. N. [1903], 102: 19 Times L. R. 455), a wife English by origin had given a guarantee

[1] Note.—At the trial, concluded since the above was written, the jury found that the husband's domicil was English; but the President ruled that there was no evidence to support that verdict, and held that the decree of the Austrian Court governed the case.

in Germany that she would make good out of her own property the amount of defalcations made by her husband (a German) provided that no prosecution of him took place: and it was held that an action could be maintained in England on this contract which was intended to be carried out wholly in Germany where it was valid, and the fact that it would not have been valid in England as being against public policy, was immaterial, provided that it was not against morality or positive law, and such as ought not to be permitted by the law of civilised countries (Wright, J.). This follows the decisions in *Santos* v. *Illidge* (sale of slaves in Brazil): *Quarrier* v. *Colston* (loan of money for gambling made abroad): *Holman* v. *Johnson*, and *Biggs* v. *Lawrence* (sale abroad of cargo by foreigners knowing that it was meant to be smuggled into England): *Bodily* v. *Bellamy* (interest at Indian rate on loans made in India allowed, though usury laws in England forbade it): as distinct from the principle of *Hope* v. *Hope* and *Grell* v. *Levy*, where the contract was immoral according to English ideas.

In *D'Este's Settlement* ([1903], 1 Ch. 898), an Englishwoman married a domiciled Frenchman, and by the marriage settlement her personal property was settled on her for life, then for issue, then for such persons as she should by deed or will appoint. She died, leaving a holograph will valid by French law but invalid by English law as being unattested, leaving to her husband all the property in the (actual) event of leaving no issue. The Court held that the 27th clause of the Wills Act 1837, which provides that a general bequest is to be construed as including property over which the testator has a general power of appointment, could not be utilised as a rule of construction for the will of a domiciled foreigner which contained nothing to show that English law was intended to govern it; and the will was accordingly not a good exercise of the power. In a previous case of similar

circumstances (*In re Price* ([1900], 1 Ch. 442)) there were words in the will which were held to introduce a different law from that of the domicil as the governing law, and the English law of construction thus became applicable although the will was not made in accordance with the English law. If, however, the testator in either of these cases had had a British domicil, then the will, though valid so far as Lord Kingsdown's Act was concerned, because valid by the *lex loci*, would have been invalid for non-compliance with the Wills Act (*In re Kirwan's Trusts*, 25 Ch. D. 373; *Hummel* v. *Hummel* ([1898], 1 Ch. 642).

G. G. PHILLIMORE.

VIII.—NOTES ON RECENT CASES (ENGLISH).

IT may be doubted whether the disinclination to limit the meaning of general words was not carried too far by the decision of Kekewich, J., in *Lambourn* v. *McLellan* ([1903], 1 Ch. 806). There a lease, under which the lessee was not to carry on any trade but that of a boot manufacturer without the lessor's consent, contained a covenant that the lessee on the determination of the lease should yield up the premises "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures, and things which then were or which at any time during the said term should be fixed, fastened or belong to the said demised messuage and premises, or any part thereof." The lessee, using the premises for boot manufacture, erected trade machinery. This, it was admitted, was fixed to the floors

of the house. It was held that it passed under the covenant as "fixtures and things which were . . . . fixed" to the premises. If it was intended that the trade machinery which, as the lessor must have known, would be affixed to the premises, should pass, it seems strange that it was not specifically mentioned in the covenant, especially when such covenant descends to the enumeration of such trifling particulars as "staples, hinges, and iron bolts." To hold this is to decide that the draftsman of the covenant did not think it was necessary to name definitely what all parties knew must be the chief subject-matter of the covenant. This decision may be correct, but if so, the draftsman's notions on drafting seem somewhat peculiar.

Of the two important decisions on sect. 6 of the Conveyancing Act 1881, one at any rate does something to clear up the meaning of that difficult enactment. In *Quicke* v. *Chapman* ([1903], 1 Ch. 659) the facts were as follows: A builder entered into an agreement to erect a number of houses on certain land, consisting of a number of sites. As a house was completed on each site, he was to become entitled to a lease of that site, but the agreement itself was not to operate as a demise or to create the relation of landlord and tenant. The builder erected a house on one plot, obtained a lease, and assigned the house and lease to A. Afterwards the builder erected another house on the site adjoining A.'s house in such a way as to obstruct the light to A.'s windows. A. brought an action against the builder for such obstruction, and it was argued that, under sect. 6 of the Conveyancing Act 1881, there was an express grant by the builder of the right to access of light to A.'s windows. Kekewich, J., adopted this view. On appeal it was held that the grant of light, if any, arising under sect. 6, must be read subject to the surrounding circumstances existing at the time A. bought the house. The builder at

that time had no legal or equitable interest in the adjoining site; he could not, therefore, grant any right to light over it. The observations of Romer, L.J., as to the difference between a specific covenant and a general grant are well worth study, and it is interesting to compare this decision with another of the Court of Appeal (*Davis* v. *Town Properties Investment Corporation, Limited* ([1903], 1 Ch. 797), where it was held that the ordinary covenant for quiet enjoyment does not bind the grantor as to neighbouring land of which he was not owner at the time of the grant.

The other decision on sect. 6 of the Conveyancing Act 1881 is scarcely so satisfactory. In *International Tea Stores Company* v. *Hobbs* ([1903], 2 Ch. 165), the plaintiff company had been lessees of one of two adjacent houses belonging to the defendant. During the continuance of the lease the defendant had given express permission to one after another of the company's representatives who occupied their house, to use a certain pathway over his yard, as a sort of short cut to the stables belonging to the plaintiff's house. The plaintiff company bought from the defendant the freehold reversion on the lease. Sometime afterwards the defendant refused to let the company's representative use the pathway over his yard. On action brought, Farwell, J., found that the right of way over the pathway was, at the date of the grant, in fact "enjoyed with" the house granted, and so it passed to the plaintiff company under the grant.

Whether this decision is correct or not in law, it will certainly prove awkward in practice. If every little neighbourly convenience, capable of being held to be an easement, which a good-natured landlord permits a tenant to enjoy, is, on the tenant purchasing the reversion on his lease, to be turned into a legal right, either landlords will have to be

careful what liberties they give tenants, or conveyancers will have to be careful to limit the operation of sect. 6 in conveyances of such reversions. But is it correct? Was the right of way enjoyed with the house? It was never enjoyed by the plaintiffs, who were lessees of the house: this is shown by the fact that each new representative of theirs obtained fresh permission to use the pathway. The permission was not then to the plaintiff company, but personally to the individual from time to time occupying the house, but with no legal interest in it at all. This clearly distinguishes the case from *Kay* v. *Oxley* ([1875], L. R., 10 Q. B. 360), where the permission was given to the legal tenant himself, and where, though the tenant's enjoyment of the easement was treated as precarious, it might reasonably have been held in equity to have been binding on the landlord, since the tenant, with the landlord's consent, specially altered the buildings on the faith of it. And, further, in *Kay* v. *Oxley* (*supra*) the purchaser was not the lessee. He was a stranger, who, not knowing what the lessee's rights were, but seeing he enjoyed the use of a made road, might reasonably assume that when he bought the house he also bought such right. But here the purchaser was the lessee. He knew perfectly well that if he enjoyed the right of way at all he only enjoyed it with the express consent of the vendor. Surely this is sufficient, within the rule laid down in *Birmingham, Dudley and District Banking Company* v. *Ross* ([1888], 38 Ch. D. 295), to show that neither party intended to transfer any legal easement over the pathway?

The decision in *In re Browne's Policy* ([1903], 1 Ch. 188), commented upon in our last issue (p. 353), has since been, for all practical purposes, overruled. In *In re Coley, Hollinshead* v. *Coley* ([1903], 2 Ch. 102), the Court of Appeal, after considering the cases cited in our comment which were not referred to in the argument in *In re Browne's Policy* (*supra*),

followed *In re Burrow's Trusts* ([1864], 10 L. T. 184), and held that the term "wife" primarily applies only to the woman who is the wife at the time the instrument using the word was executed. And in *In re Griffith's Policy* ([1903], 1 Ch. 739), Joyce, J., in a case practically identical with *In re Browne's Policy* (*supra*), held that a policy of assurance under the Married Women's Property Act 1870 in favour of the assured's "wife, or if she be dead between her children," did not operate in favour of a second wife of the assured.

In *In re Biss, Biss* v. *Biss* ([1903], 2 Ch. 40) a very desirable limitation has been put upon the doctrine of *Keech* v. *Sandford* ([1726], Sel. Cas. 61). There the tenant of a common lodging-house, who had been lessee but was at the time of his death a tenant from year to year, died intestate. His widow took out administration, and his son managed the business. The widow applied for a lease of the lodging-house, but the landlord entirely refused to grant a lease to anyone representing the intestate's estate. He subsequently granted a lease to the son as a personal favour. Buckley, J., felt compelled by the decision in *Ex parte Grace* ([1799], 1 Bos. & P. 376), to hold that the son was a constructive trustee of the lease for those interested in the intestate's estate. This decision the Court of Appeal reversed, laying it down that a person having a partial interest in a lease is not trustee of a renewal granted to him, unless he has obtained the renewal by fraud, or unless he was in a fiduciary position towards the other persons interested (as trustee, administrator or partner), or unless the lease is renewable by agreement or custom. *Ex parte Grace* (*supra*) is within this rule, as the person there obtaining the renewal was the administrator.

Capital and Counties Bank v. *Rhodes* ([1903], 1 Ch. 631), is of great importance to conveyancers, since it decides

several points as to the effect of registration under the Land Transfer Acts, 1875 and 1897. These points may be stated thus:—Firstly, sect. 20 of the Act of 1897, which enacts that on a sale the legal estate shall not in compulsory registration districts pass until the transfer is registered, applies only to the first registration. There is nothing in the Act to prevent the legal estate after registration passing under any ordinary conveyance without registration. Secondly, the right of a registered owner to transfer by registered transfer depends not upon his having the legal estate, but upon his being registered proprietor. Accordingly, if the legal estate in registered land is transferred by ordinary unregistered conveyance, the registered owner may defeat it by a registered transfer under the statutory power given him as registered proprietor to transfer it. Thirdly, though a registered charge does not transfer the legal estate to the mortgagee, yet the legal estate may be transferred by ordinary mortgage, and the charge may be registered and (with the approval of the registrar) such conveyance added to the register. It is well known that the latter is the mode of registration which, after much deliberation, has been generally followed of late, where the mortgagee is not content with a registered charge merely but wishes to have in him the legal estate.

"Estoppels," says my Lord Coke (Co. Litt. 352a), are "an excellent and curious kind of learning." Jessel, M.R., on the other hand, to whom they seemed more curious than excellent, says (*General Finance and Mortgage Discount Co.* v. *Liberation Permanent Benefit Building Society*, 10 Ch. D. 15, at p. 25), they are a device "by which falsehood is made to have the effect of truth." That is very much what the estoppel pleaded in *Bell* v. *Marsh* ([1903], 1 Ch. 528) seemed to be. There the plaintiff purchased a piece of land. He knew perfectly well what he intended to buy.

He retained a solicitor who owned the adjoining piece of land to investigate the title. It so happened that the solicitor had many years before built a greenhouse on his land which encroached—unknown to him—to a certain extent on the land contracted to be bought by the plaintiff. The solicitor had acquired, at the date of the sale to the plaintiff, a good title to the encroachment under the Statutes of Limitations. He investigated the title for the plaintiff, but failed to notice that his greenhouse encroached on the land as set out in the contract of sale, and so he advised that the title was good and the conveyance to the plaintiff was completed. Later the solicitor died, and later the plaintiff sued his representatives to recover the ground under the greenhouse. He claimed this, not because he pretended that he ever thought he was buying it when he executed the conveyance, but on the ground that the advice of the solicitor that the title was good was a representation on his part that the plaintiff would get a good title to all the land described in the conveyance, and so that the solicitor was estopped from alleging that he had acquired the site of the greenhouse. Buckley, J., felt bound by this contention, but the Court of Appeal rejected it on the ground that, whether the advice on title amounted to such a representation or not, the plaintiff did not buy the land in consequence of it.

J. A. S.

In order to attach to goods supplied under a contract of sale an implied warranty of reasonable fitness for the use to which they are to be put, it is required by the Sale of Goods Act 1893, s. 14, that the buyer should make known to the seller the particular purpose for which they are wanted. This requirement is met if the goods are sold under a description which points to one particular purpose only. In *Preist* v. *Last* ([1903], 2 K. B. 148) a "hot water bottle" made of india rubber was bought over the counter at a

chemist's shop, and the vendor was held liable for damage caused by the bursting of the bottle in the course of ordinary use, as the contract was to supply the buyer with an article "fit for use under circumstances in which such goods are usually applicable." The above case was decided under the first part of the section. Under the second part it was held, in *Wren* v. *Holt* ([1903], 1 K.B. 610; L. J. R., 72 K. B. 530), that there was an implied condition of merchantable quality in beer of a particular brewer bought at a beerhouse, and that as any examination which the buyer could have given to the sample would not have revealed the defect which caused damage to him, the vendor was liable under the sub-section; though Vaughan Williams, L.J., was of opinion that the sale of goods over a counter, where the seller deals in the description of goods sold, was not a sale of goods by description within the section.

In *London and North Western Railway* v. *Hinchcliffe* ([1903], 2 K. B. 32; L. J. R., 72 K. B. 530) the Divisional Court considered the measure of a railway company's claim for extra payment from a passenger who travels beyond the station to which he has booked. The fare between two stations on the plaintiff's railway was, in consequence of competition, reduced, and a passenger, who meant to travel to the more distant one from a station on the same line, but not within the sphere of competition, took a ticket to the nearer point and claimed to travel thence by the same train to the other point of competition at the reduced fare. The cost of the journey so paid in two parts would be less than the cost of a through ticket. The ticket taken was, as usual, expressed to be issued subject to the rules and regulations of the Company; and one of the rules was that a passenger could not re-book at an intermediate station by the same train. Another rule was that, if a ticket were used beyond the station to which it was available, the Company might

demand "the difference between the sum actually paid and the fare between the stations to and from which the passenger has travelled" or, at their option, "the fare from the station to which he has booked to the end of his journey." The Court held that the railway company were entitled to demand the larger sum.

It is one of the daily occurrences of railway traffic for a ticket holder, for a score of honest reasons, to extend his journey beyond the point to which he has in the first instance paid his fare; and it is very doubtful whether the company could enforce their rule that he should not re-book by the same train; but such a passenger is guilty of a tort, and he is liable to a penalty under s. 103 of the Railways Clauses Act 1845.

T. J. B.

SCOTCH CASES.

Two recent cases illustrate the inequitable application of the maxim *actio personalis moritur cum persona*, even in the modified form in which that maxim still maintains a place in Scottish law (*Boyce's Executor* v. *M'Dougall* ([18th February, 1903], 40 Sc. L. Rep. 361); *Aitken* v. *Gourlay* ([4th March, 1903], 40 Sc. L. Rep. 398). In the case of *Boyce* three out of the four judges of the Second Division held themselves bound by *Bern's Executor* v. *Montrose Asylum* ([1893], 20 R. 859), and refused to entertain the claim of an executor to damages in respect of injuries sustained by the deceased, in consequence of which she was alleged to have died. In *Aitken's Case* the same question arose in a somewhat different form. The action was at the instance of the mother of the deceased, and it was held that she could not sue because her husband, although divorced for long-continued desertion, could not be proved to be dead. Had an executor been permitted to

sue in the respective interests of all the legal relatives, the difficulty would not have arisen, and obvious injustice would have been avoided. The Common law is supposed to have done for Scotland what Lord Campbell's Act (9 & 10 Vict., c. 93) did for England, and there is also the operation of the Employers' Liability Act of 1880 (43 & 44 Vict., c. 42), which is common to the two countries, and which gives relief in certain specified circumstances. The general question however remains, whether any restriction is necessary, and whether it would not be equitable and expedient to permit an executor to sue in tort, in the same manner as by the law both of England and Scotland he has long been permitted to do in contract. The Common law of Scotland and the Statute law of England permit a claim against the wrong-doer through whose default the deceased has lost his life, but that only "at the instance of a wife for the death of her husband, a husband for the death of his wife, a parent for the death of his child, and a child for the death of his parent" (*per* Lord Pres. Inglis in *Eisten* v. *North British Railway Company* [1870], 8 M. 980). But why should an executor, who represents the deceased, and who is bound to distribute his estate in the manner recognized by the law as equitable, be prevented from recovering damages which the deceased himself could have recovered if he had survived, and which if not recovered will sensibly diminish the deceased's estate? The question was fully discussed in *Bern* v. *Montrose Asylum* (*ubi sup.*) and in *Auld* v. *Shairp* ([1874], 2 Ret. 191). The latter case was altogether favourable to the claim of the executor, and the later case of *Bern* was decided by a bare majority of a Court of seven judges. Strange to say, Lord Young, who as one of the majority in the case of *Bern* decided against the claim of the executor, dissented from the judgment in *Boyce's Case* now under notice. His own statement is as follows: "I cannot include myself as adverse in *Bern's Case*

to the title to sue except upon the ground that the husband was alive, that the title was in him, and that he was not suing." Although, therefore, Lord Young concurred in the result of *Bern's Case*, he was not opposed to the claim of an executor as such. Had he not been swayed by specialties, his vote would have turned the minority into a majority, with the probable result that the Common law of Scotland would now have been firmly fixed in favour of the executor.

In *Rennet* v. *Mathieson* ([4th March, 1903], 40 Sc. L. R., 421), we have an instance of the tenacity with which the case of *M'Bain* v. *Wallace & Company* is still cited and applied, although the whole foundation of that case has been swept away by the Sale of Goods Act 1893. Even during what may be called its lifetime, *M'Bain's Case* was a source of endless trouble, and, being a House of Lords judgment, it led to contradictory decisions in the Court of Session; (cf. *Pattison's Trustee* v. *Linton* [1893], 20 R. 806, and *Liddell's Trustee* v. *Warr & Company* [1893], 20 R. 989). Lord Young has been consistent throughout. He was on the Bench in 1881 when *M'Bain's Case* was decided by the Court of Session, and gave a remarkably lucid opinion, entirely on the same lines as those of his fellow judges of the Second Division. It was to the effect that a ship on the stocks, from its ponderous and practically immoveable character, was capable of being delivered so as to pass the property without actual change of locus. On appeal, the House of Lords ignored this ground of judgment, and founded solely on the first sect. of the Mercantile Law Amendment (Scotland) Act 1856, which, although conceived in favour of the contract of sale, was held to be equally applicable to a security in the form of a sale. The effect was to destroy the old maxim of Scottish law "*traditionibus, non nudis pactis, transferuntur rerum dominia,*" not only in regard to

sale, but also in regard to security. The Sale of Goods Act 1893 repealed the section referred to of the Mercantile Law Amendment Act, and in its place it introduced the English principle of passing the property by intention, not by delivery. The substitution preserved the effect of the Mercantile Law Amendment Act so far as regards sale, but it was accompanied by an express provision (sect. 61 (4)) that the Act should "not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security." This clearly cut off security from the special treatment accorded to it by *M'Bain's Case*, and left it to be dealt with according to the old law of Scotland. Since the passing of the Sale of Goods Act this interpretation has been frequently confirmed by the Scottish Court (*Robertson* v. *Hall's Trustee*, [1896], 24 R. 120; *Jones' Trustee* v. *Allan* [1901], 4 F. 374; *Rennet* v. *Mathieson, ubi sup.*). These were all judgments of the Second Division, the last being the case now under notice. In all of them Lord Young dissented, and uniformly founded on the House of Lords judgment in *M'Bain's Case*. His argument is frequently ingenious, but he fails to grasp the full effect of the statutory change of the law. In the present case he seems to go beyond any of his previous utterances, in so far as he boldly states that the Common law, apart from statute, permitted of the effective sale and subsequent hire of furniture by mere "imported" delivery without actual change of possession. The specialties connected with ships to which we have already referred may have justified the Court of Session judgment in *M'Bain's Case* to which he was a party, but surely he cannot maintain, in face of a long series of decisions, that the rule can be applied to such moveable subjects as furniture, or, as in *Rennet's Case*, to plant, stock, and fittings, which are easily capable of physical delivery.

R. B.

IRISH CASES.

Does the rule in *Shelley's Case* ever operate otherwise than to defeat the intention of a testator or donor? Lord Macnaghten, in his classical discussion of the rule in *Van Grutten* v. *Foxwell* ([1897], A. C., at p. 669), goes so far as to say that such defeat of intention is indeed "its very end and purpose." One thing seems clear—that once words are introduced into a gift which attract the rule by "including successively all who might pretend to inheritable blood," it is a matter of extreme difficulty for the donor to get over that by almost any manifestation of a contrary intent. *In re Keane's Estate* ([1903], 1 Ir. R. 215, is one of the latest examples of the rule's application, which here certainly did result in defeating a testator's intention. A. devised fee-simple lands, in trust for B. for life, and after B.'s death to the use of B.'s second son C. for life and his issue male in succession. Now, if the devise stopped here, there could be little room for doubt; numerous authorities establish that in a will "issue" is to be taken in the same sense as "heirs of the body." But then the devise continued: "so that every such son may take an estate for life, with remainder to his first and every subsequent son successively, according to seniority in tail male." A strenuous but unsuccessful attempt was made to contend that the will showed that "issue male" here meant children, and there could be no doubt that the testatrix intended to create a succession of life estates. This, of course, would create some difficulty in regard to the rule against perpetuities, but in fact C.'s second son was born in A.'s lifetime. However, Ross, J., was of opinion that the words used did not of themselves do more than indicate correctly the ordinary course of devolution of an estate-tail, in case no tenant

in tail takes the necessary steps to convert it into an estate in fee. He therefore decided that there was nothing in the will to prevent the ordinary application of the rule, and as C.'s second son had executed a disentailing deed, he was held now absolutely entitled. In fact, as has been already established by *Van Grutten* v. *Foxwell*, the rule is not a rule of construction but a rule of law, and operates invariably and automatically whenever the limitations are such as to call for its application.

If Macaulay's schoolboy ever turned his attention to law, he was probably aware that since Fox's Libel Act the question of "libel or no libel" is altogether a question for the jury. But is a Court of Appeal absolutely debarred from supervising and interfering with the finding of a jury on this question? Clearly not, if the finding is perverse or corrupt. And *M'Inerney* v. *Clareman Printing Co.* ([1903], 2 Ir. R. 347) shows that the supervisory jurisdiction of the Court, although it is to be exercised with the greatest caution, is not altogether confined to cases of perversity or corruption.

The facts, and the history of the case, are peculiar, and unfortunately complicated with unhappy occurrences in Ireland. The plaintiff was an auctioneer and farmer in County Clare. He took a farm which had been surrendered by tenants who were not willing to give the rent which the plaintiff agreed to pay. A brother of one of these tenants brought the matter before the United Irish League, who discussed it at several meetings. The defendants' paper published several reports and letters dealing with the matter. In some of these the plaintiff was described as "a land-grabber"; and the publications did him serious damage in his business as an auctioneer. He subsequently brought his action for libel: the defendants pleaded no libel, fair comment, and a defence under the Newspaper Libel Act,

that the publications complained of were made in the ordinary way of business, and were fair reports of proceedings of public meetings concerning matters of public interest. At the trial the jury found that the publications were not libels, and on the issues of fact as to the special defences being also left to them, they found that the matters commented on and published were matters of public interest. On an application by the plaintiff for a new trial, the Court of Appeal held that the verdict should be set aside; that there was no evidence to go to the jury as to the publications being of public interest, and that a verdict on the special defences should therefore have been directed for the plaintiff. Inasmuch, therefore, as the question of libel or no libel had in effect not been left to the jury *simpliciter*, but complicated with the other issues, which might have prevented the jury from apprehending clearly the question to be tried, the Court was of opinion that there should be a new trial. It was of course pressed in argument that libel, in respect of the supervisory jurisdiction of the Court, stands on a different footing from other torts, since in the case of libel the finding is really a matter of opinion alone, and the opinion of the Court cannot be substituted for that of the jury. Such a verdict, it was stated, had only been set aside in three reported cases during the hundred and thirty years which had elapsed since Fox's Libel Act. The Court of Appeal, however, considered that the jurisdiction to set aside a verdict in a case of libel was the same in kind and in principle as the jurisdiction to set aside a verdict upon any ordinary issue of fact. In both cases, it is the Court's duty not to set aside a finding as against the weight of evidence, if in its opinion the jury could have reasonably found as they did, on the evidence in the particular case. There might be, and probably was, a difference in degree in regard to a finding of "no libel." "From the nature of the subject-

matter," said Walker, L.J., "it will always be more difficult to interfere with the finding of the jury for a defendant in a libel action than in many others, inasmuch as opinion formed on all the circumstances of the case, including the interpretation of the language used, is so large a factor in arriving at a result." Still, in the present case, the Court could not resist the conclusion (which one may perhaps admit must have been in part founded on their own knowledge as to the meaning of words) that to call a man a "land-grabber" in County Clare is obviously libellous, and that therefore the finding here was one which could not have been reasonably arrived at. It may have been that the jury thought "no libel" was the legal inference from their findings on the questions of privilege and the other special defences improperly left to them.

It is interesting to note that on the new trial the jury found that the publications were libels, and awarded the plaintiff substantial damages.

The ordinary action of seduction is no doubt founded on what is well-nigh a fiction of service, but there must still be something to sustain that fiction, and *Hamilton* v. *Long* ([1903], 2 Ir. R. 40), shows a set of circumstances in which service will not be implied. The plaintiff was a widow, and sued for the seduction of her daughter, which had taken place during the lifetime of the plaintiff's late husband. The daughter was then living with her parents, and after her father's death continued to reside with the plaintiff, rendering the ordinary household services. The birth of her child took place two months after the father's death. The King's Bench Division held that the action could not be maintained by the widow, either at common law or by virtue of the Married Women's Property Acts. The service must be to someone whom the law recognises as master: and at common law certainly the only master

was the father. The Married Women's Property Acts, in the words of Gibson, J., do not displace the husband's "paternal guardianship and authority. They affect him as a husband, not as a father." Fiction, it was said, must stop somewhere. No doubt it was very hard that it should have to stop in this particular case.

A curious, well-intentioned, but absolutely illegal practice prevailing on the hearing of licensing applications in the City of Dublin, came before the Court in *Rex* (*Bourke*) v. *Justices of Dublin*, and *Rex* (*Moriarty*) v. *The Same* ([1903], 2 Ir. R. 429). The applicant for a new licence, in consideration of its being granted, paid into the Recorder's Court a sum of £400, to be applied in purchasing and extinguishing an operative licence, with the approval of the Court. It had long been the Recorder's practice to require payments into a fund for these purposes, as a condition precedent to the granting a licence, and the fund had attained considerable dimensions. The King's Bench Division and the Court of Appeal were very clearly of opinion that to require such payments was absolutely illegal. The question of undertakings as to the user of their premises, given by applicants for licences, was also considered, and the cases establish that some of such undertakings are indirectly enforceable. An applicant for a certificate of good character, to enable him to renew his licence, gave an undertaking in open Court to persons objecting to the granting of the certificate, that he would remove a public drinking-bar. He failed to carry out this undertaking. The Court held that such conduct was evidence to sustain the decision of a licensing authority, before whom the application came for a certificate of good character in the following year, that the applicant was not "of good character" within the meaning of the Licensing Acts.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

The Student's Text-Book of Roman Law. By C. NICHOLAS BARHAM. London: Stevens & Sons. 1903.

There are so many mistakes in this publication that they cannot all be misprints, and they are apt to raise serious doubts as to the adequacy of the author's Latinity as well as of his law. There is no index, and almost every page has its error. What is to be said, for instance, of *hereditatus*, *libertatus*, *patrones*, *vulgarus*, *actio de constituta pecuniæ*, *jus honorarium* (where *honorum* is meant), *Sc. Largiana*? On p. 28 we are told that "marriage was forbidden . . . . . . between senators and *liberti*, until abolished by Justinian"! On p. 30 a distinction is drawn between *donatio ante nuptias* and *donatio propter nuptias*, but nothing is said as to Justinian's criticism of the phrases.

Encyclopædia of Accounting. Vol. I. Edited by GEORGE LISLE, C.A. Edinburgh: William Green & Sons. 1903.

This is the age of encyclopædias, but it is rather difficult at first to understand what the title of Messrs. Green's handsomely got-up volume means. We suppose it really is a collection of information, legal, commercial, and technical, for the benefit of accountants. Although many of the little pieces of definition therein would not we think be much use to anybody, such as one that met our eye on the first page under the heading "Abstract of Title," there are a number of well-written articles on subjects closely connected with the special duties of accountants, and which are of value not only to such professional men and students, but also should be profitable for reading and reference to commercial and legal men alike. Some of the most important of these are the articles on Book-keeping, Balance Sheets, Banking, and Auditing. Other shorter ones contain useful. information, such as Builders' Accounts, Brewers' Accounts. The most important legal articles are on Bankruptcy and Arbitration. It will be a comprehensive and useful work when it has run through its many volumes. The present one embraces the subjects from "'A' list of contributories" to "Buying in."

The Metropolis Water Act 1902. By DOUGLAS C. BARTLEY London: Stevens & Sons. 1903.

Although this Act is concerned with property of vast value, and the litigation in connection with the buying up of the Metropolitan Water Companies will be very profitable to those who may be fortunate enough to be concerned in it, it is not a subject that will practically interest a very large number of persons. To those who are concerned, however, it will be useful, as it consists of an annotated edition of the Act with cross-references, and the sections of such other Acts as are referred to or incorporated, set out. These other Acts are, generally speaking, either Acts relating to Water Companies, or Local Government or Public Health Acts; but there are also incorporated provisions of the Municipal Corporations Act 1882, and references to other Acts. Some useful additions in the Appendix are Circulars and Orders of the Local Government Board, and the regulations as to procedure made by the Commissioners of the Court of Arbitration.

The Education Acts 1870–1902. By H. C. RICHARDS, K.C., M.P., and HENRY LYNN. London: Jordan & Sons. 1903.

The Law of Education. By W. R. WILLSON. London: Sweet & Maxwell. 1903.

Second Edition. *The Education Act 1902.* By M. BARLOW, LL.D., M.A., and H. MACAN, M.A. London: Butterworth & Co. 1903.

The Education Act 1902 is a very important, and what is more material to our point of view, a very complicated and difficult Act, and all who have to administer it, or are directly affected by it, will feel the want of a good guide. Of these it is evident that there will be no lack, and in their different ways those now before us are deserving of sincere commendation. That by Messrs. Richards and Lynn has for its full title *The Local Authorities' and Managers' and Teachers' Guide to the Education Acts*, and it contains an immense amount of valuable information, collected and arranged by two learned gentlemen who have had considerable experience of educational work on the London School Board; and Mr. Lynn has besides, we believe, had the exceptional advantage of having been for many years standing Counsel to the National Union of Teachers. The introduction deals with the history of Education from somewhere about 1835 to 1902. Then comes the text of the Education

Act of 1902, with full notes, references, and suggestions. For an illustration, under sect. 1 we find attention called to the somewhat equivocal use of the term "Local Education Authority" as sometimes referring to the County Council and sometimes to the smaller local body. There is also a list of County Boroughs, from which, however, Buckingham and Cambridge are omitted. The notes are very full, and are always valuable even when, as in a few cases, we are not prepared to agree with them. As instances of the few points on which we think the learned authors are in error, we might instance the note to sect. 3, where it is stated that "in a county or county borough the rate is limited to two-pence unless enlarged by the Local Government Board." This, we think, is a slip, as by sect. 2 the limitation of the rate to twopence in the pound is applied only to the council of a county. We also cannot agree with the suggestion thrown out in the note to sect. 7, that the local authority have not power to direct a teacher to be dismissed, but only a veto on the dismissal. Besides this Act there are three appendices. "A" gives the Day School Code 1902; "B" the text of the Act of 1902 without notes, the Elementary Education Acts of 1870, 1876, 1880, 1891, the Education Code 1890 Act, the Elementary Education (School Attendance) Act 1893, and the Voluntary School Act 1897. It also contains the Acts or sections of Acts dealing with children employed in labour, in mines, in canal boats, blind and deaf children, defective and epileptic children; the School Sites Act 1841—1851; "C" contains the important circulars issued by the Board of Education. It will be seen that there cannot be many Acts required for reference for education purposes which will not be found here ready for use, and these, combined with the treatment of the principal Act, make the book one of great value to those for whom it is designed, namely, all who are interested in Education.

Mr. Wilson's book is designated as a practical guide, and we think the title is justified. It is remarkable in one way among law books in the fact that only seven cases are cited. It gives a well-arranged account of the provisions of the Act of 1902, and gives to an unusual extent the text or provisions of the Acts which are practically to a great extent incorporated in the Act, or which, at any rate, require to be known in order to understand it—such as the Elementary Education Act of 1870, the Local Government Act 1894, the Public Health Act 1875, the Local Loans Act 1875, and others.

There is a very full Appendix, giving the Education Acts, a number of general Acts connected with the subject to some extent, and a very large number of Rules, Orders, Forms, and Regulations. The whole make a complete and useful guide.

Messrs. Barlow and Macan have taken time by the forelock, and have the most satisfactory evidence of the value of their book that authors can desire, as the first edition has already been exhausted and a second is required. They possess both legal and technical qualifications, as Mr. Macan is Education Secretary to the Surrey County Council, and mainly responsible for the important parts of the work dealing with Finance and the suggestions for Local Authorities during the Transition Period. There is a short sketch of the law prior to 1902, divided into Elementary Education, Secondary Education, and the Finance of Education: and then comes a summary of the Education Act 1902, followed by some twenty pages, which we think of the greatest practical value to all parties concerned, namely, as to what must be done in the Transition Period. We notice in the preface that this part has been amplified, owing to the very considerable number of private owners of school premises who have found themselves compelled to make legal arrangements in consequence of the Act. The Act of 1902 is then given with some very useful and careful notes. One we might call attention to is the note on sect. 5, where the *Cockerton Case* is considered, and the differences in the judgments of Wills, J., and of the Court of Appeal pointed out. In the appendices are contained the Memoranda and Circulars of the Board of Education; a draft scheme for a County Education Committee; the local education authorities for higher and elementary education, together with names and addresses of secretaries and clerks, the additional local education authorities; and a list of approved voluntary associations.

The History and Law of Fisheries. By STUART A. MOORE, F.S.A., and H. STUART MOORE. London: Stevens & Haynes. 1903.

Third Edition. *Oke's Fishery Laws.* By J. W. WILLIS BUND, M.A., and A. C. MCBARNET. London: Butterworth & Co. 1903.

Attention was drawn not long ago in a well-known book on Legal Literature to the fact that "the text-books on fishing law are scarce and scanty compared with the importance of the subject." If this reproach was true, it has now at any rate been removed by the two

books whose titles are given above. They may be both considered as new books; for, although *Oke's Fishery Laws* is said to be published as a third edition, yet as it now embodies *Bund's Law of Salmon Fisheries* and *Paterson's Fishery Laws*, it is practically a new work. They are both most useful works, and deal completely with all the subjects to which they are devoted, but yet differ in their special excellencies. Oke's book would, we should think, be more useful to the fisherman as such, benches of magistrates and their clerks, and poachers—if such lawless beings ever buy law books. On the other hand, the Messrs. Moore's book is invaluable to all who have to consider questions connected with title and evidence proving the right to fisheries, and all legal questions of such a nature.

Mr. Stuart Moore's great knowledge of records gives him an unequalled authority in discussing the many important historical questions connected with the early law of fisheries, and the full illustrations he gives of the various grants to be found in the records constitute a remarkable and valuable feature of his work. He also possesses an undoubted advantage in being able to discuss many decisions with an unusual knowledge of the facts of the cases, and thus be able to point out with great clearness what was really decided in each case. It is rather remarkable to notice how many erroneous opinions seem to have crept into the law, some of which have only been comparatively lately corrected. This the Authors attribute to the fact that none of the early text writers on this branch of law possessed much knowledge of records with the exception of Lord Hale.

All these questions are dealt with fully, with abundant skill and learning, and some important conclusions maintained with great force. One of the most important of these questions is, whether fisheries are as a rule corporeal or incorporeal hereditaments, and it is contended that Lord Coke's dictum was erroneous, and that the law as settled in recent cases is, that "the ownership of a several fishery in tidal waters raises the presumption of ownership of the soil," and "that a fishery in tidal waters exercised over land belonging to the owner of the fishery is not a franchise but a profit of the soil." Again, on the authority of Lord Hale, it is stated that all the text books are incorrect in saying that a fishery may be appurtenant to a manor in the sense that it is an incorporeal hereditament. There is an interesting examination of the decision of Mr. Justice

Wills, in *Edgar* v. *Special Commissioners of Fisheries*, and a decided dissent from the opinion of that learned judge on the question whether a "right to take all the fish in a public navigable river could be claimed as appurtenant to land." Another very important discussion will be found in the examination of the cases as to the principle to be followed in defining the bed in non-tidal and tidal rivers, and the judgment of the Court of Appeal in *The Conservators of the River Thames* v. *Smeed* is adversely criticised. The only other point we have space to call attention to is the doubt expressed as to the absolute soundness of the decision of Mr. Justice Lindley in *Foster* v. *Wright*, and whether a "landowner cannot rebut the doctrine of accretion by showing the former boundaries of his land." So far we have only been referring to Part I or the Common law of the subject. Part II deals with the Statute law relating to Fisheries. In the Appendix are given all the Statutes, Regulations as to registering, &c., sea-fishing boats, Lists of Fishery Districts, and two very interesting Lists of Fisheries referred to in the *Domesday Book*, and another of Fisheries referred to in ancient records.

The great merit of *Oke's Fishery Laws* is the elaborate care and practical knowledge with which the Statutes, especially those on Salmon Fishing, are annotated. This renders it especially valuable to those who have to administer the Acts and consider the complications caused by the "patchwork character of much of the Fishery legislation." There is an useful chapter on local fishery regulations dealing with the Tweed, Thames, and Norfolk and Suffolk. The work concludes with a collection of useful forms, tables of districts, &c.

Second Edition. *The Finance Act 1894.* By J. Eustace Harman, M.A. London: Stevens & Sons. 1903.

No Act that has ever been passed requires a guide more than the Finance Act, and any one who has to construe it will find much assistance in Mr. Harman's little book. It consists of an introduction of about forty pages; then the Finance Act 1894, so far as it relates to the Death Duties, with copious notes and references to the Amending Acts such as section 11 of the Finance Act 1900, which was passed in consequence of the decision in *A.-G.* v. *Beech.* The Appendix contains the text of the Finance Act 1894, and such parts of the subsequent Finance Acts of 1896, 1898, 1900 as are applicable to the subject of Death Duties.

Second Edition. *A Compendium of Sheriff and Execution Law.* By PHILIP E. MATHER. London: Stevens & Sons. 1903.

In this Edition Mr. Mather has considerably enlarged its scope as regards Bankruptcy and other important matters, and it now constitutes a very complete compendium of information as to the law and practice connected with the multifarious and difficult duties of a sheriff, or rather we ought to say of an under-sheriff, for it is by under-sheriffs it is likely to be consulted, not by sheriffs. We expect it will be consulted by many others as well; for there is a large amount of rather out of the way information carefully arranged, with the addition of a large number of useful forms. We might particularly call the attention of any gentleman who is serving the office of under-sheriff for the first time to the very complete summary of his duties at the assizes.

Second Edition. *Commercial Law.* By J. G. PEASE. London: Macmillan & Co. 1903.

Fourth Edition. *Stevens' Mercantile Law.* By HERBERT JACOBS. London: Butterworth & Co. 1903.

Both these books are written with much the same object, and both are well adapted for their purpose. They are intended as elementary text books for Commercial Classes, and although they would both be useful to legal students they should only be considered with reference to their professed object. Mr. Pease is particular, and very properly so, to remind his readers that his book only professes to be an outline, and goes on humorously to caution his readers against being so puffed up with their knowledge of Commercial law that they make acquaintance with that of Bankruptcy. The subjects Mr. Pease treats of are Contracts generally, Leading Commercial Contracts, Bankruptcy, and a useful little chapter on the application of law. In the Appendix are some Insurance Forms, and a number of questions useful either for examination purposes, or to enable a student to test his knowledge. The law seems to us to be carefully and accurately laid down within its limits, and although no statutes or cases are cited, at the end of some of the chapters suitable authorities are recommended. A small addition which we think might usefully be made, would be a short account of the cases in which interest is by-law payable.

Stevens' Mercantile Law is suitable for more advanced classes of law students to begin with. It covers very much the same ground

but has some additional subjects, and treats all the subjects more fully, and also gives a table of cases, and one of statutes. Although stamps are very important in practice, we are rather inclined to think Mr. Jacobs is right in omitting the subject, and devoting the space thereby gained to subjects of more value to students.

Fourth Edition. *The Law of Copyright.* By THOMAS E. SCRUTTON, K.C., M.A. London: William Clowes & Sons. 1903.

Every writer on the Law of Copyright begins by finding some fault with the drafting of the Copyright Acts. Mr. Scrutton is no exception. In his preface he comments on "the numerous and ill-drawn Acts." Mr. Scrutton might have gone on to say, and we do, that such a state of the law renders a work by a learned and able writer of the highest value. We think it may perhaps interest some of our readers if we point out what is Mr. Scrutton's opinion in regard to some vexed questions. In an interesting sketch of the history of English Copyright he maintains the correctness of the decision in *Millar* v. *Taylor*, that authors were entitled to copyright at Common law undisturbed by the statute of Anne. He is severe on the decision of Lord Camden, in *Donaldson* v. *Beckett*, and remarks satirically, "How could the peers resist such eloquence as this; indeed, the only fault to be found with such generosity and high-mindedness is, that it is at other peoples' expense. Possibly if applied to the remuneration of my Lord Camden's own intellectual labour, his Lordship might have considered immortality an unrealizable commodity for the wants of daily life." Mr. Scrutton points out two great faults in the English Law of Playright—which term he applies to performing or acting right—and Dramatic Copyright. "In the first place, playright and copyright, which are merely protections of different modes of communicating the same intellectual results to the public, are treated in different ways, and may begin and end at different times. Secondly, that tendency of the English law, which in questions of infringement seems rather to consider whether new work has been added than whether old work has been taken, is specially prominent in the case of dramatization of novels." It is worth noticing that it is not clear that playright in pieces performed but not printed is not perpetual, although Mr. Scrutton inclines to the opinion that a Court would probably not take that view. The author dissents strongly from the doubting

opinion of Sir J. F. Stephen in his *Digest*, and the Copyright Commission in their report, that playright cannot be gained if the dramatic piece has been previously published in print, and considers it quite clear that it can. Among other points we notice that the author is, perhaps naturally, quite dissatisfied with the decision of the House of Lords in *Walter* v. *Lane*, which, he hints, has raised a "phonograph" to the dignity of an author. We must conclude in calling attention to the "deplorable blot on the international agreement" which has been caused either by the bad drafting of the English Act of 1862, or an erroneous opinion of the law officers, and the result of which is that "works of art produced by United States subjects are shut out from English copyright, though English works of art produced in England by British subjects can obtain United States copyright." All will agree with Mr. Scrutton in thinking that this "blot" should be removed as soon as possible.

Fourth Edition. *Fry on Specific Performance.* By W. DONALDSON RAWLINS, K.C. London: Stevens & Sons. 1903.

Sir Edward Fry's great work is, of course, the authority on the important subject of Specific Performance, and although the present edition has not had the advantage of his supervision, yet it has that of the able and learned lawyer who assisted in the preparation of the second edition. As more than ten years have elapsed since the appearance of the third edition, a considerable amount of new material required to be assimilated, and upwards of 300 new cases are cited. A certain number of comparatively new statutes are referred to, amongst others, the Voluntary Conveyances Act 1893 and the Married Woman's Property Act 1893. The Land Transfer Act 1897 has also had to be considered although there are but few decisions on it. Attention is specially called to the "exceptional and anomalous rule established in *Flureau* v. *Thornhill*," and a number of cases have been recently decided on the two important subjects of "Wilful Default" and "Doubtful Title." The former subject is elaborately examined and the result of the authorities carefully summed up by Buckley, J., in the very recent case of *Bennett* v. *Stone*. To lay down definite rules on the question of Doubtful Title is very difficult, owing to, among other causes, "the ebb and flow of judicial opinion and decision for and against the rule which has characterised the cases of the last quarter century,"

but we can refer our readers to the attempted classification of the doubts which, in the opinion of the learned Author, "would, and of those which would not prevail with the Court," and we think they are not likely to find greater assistance given elsewhere.

Sixth Edition. *Ellis's Trustee Acts.* By L. W. BYRNE. London: Stevens & Sons. 1903.

Mr. Byrne is responsible for the present edition of this useful little work; although we are informed in the preface that Mr. Ellis, the Author and Editor of previous editions, has read the proofs and made many valuable suggestions. It consists mainly of three Acts. These are the Trustee Act 1888, or at least so much of it as has not been repealed; the Trustee Act 1893; the Judicial Trustees Act 1896. These Acts are annotated with a careful consideration of the practical questions involved, and great attention is paid to the important subject of investments. A very complete list is given of the various investments which are authorized under the Trustee Act 1893; and by reference to the notes to sections 1—4 of that Act and to the valuable tables in Appendix I, the investor or his adviser can, at once, satisfy himself whether any proposed investment comes within the category of those authorized or not. The Appendix referred to contains a table showing the rates at which dividends have been paid by the principal Railway Companies during the last ten years; particulars of principal leased railways; table of principal Waterwork Companies which have paid dividends of not less than five per cent. on ordinary stock during past ten years; and a table of stocks of Municipal Boroughs and County Councils.

Seventh Edition. *Mayne's Treatise on Damages.* By J. D. MAYNE and L. SMITH, K.C. London: Stevens & Haynes. 1903.

Mr. Mayne's is a very remarkable experience. It has not been granted to many legal authors to be able to supervise a new edition of their original work—and that work without question the authority on its subject—forty-seven years after it was first published. This, Mr. Mayne has now accomplished with the aid of Judge Lumley Smith, and we must congratulate him on the achievement. Although there are not often great alterations or startling innovations in the Law of Damages, yet, in so wide-reaching and important a branch of the law there are constantly cases decided dealing with new points,

or settling doubtful questions. The result of this is that every few years a new edition is called for and the value of the careful and judicious editing of its Authors becomes apparent. As an instance of how even after all these years some important points are unsettled, we may call attention to an addition in this edition where an important contribution has been made to the discussion of the question of the *remoteness of damage* by the reference to the recent case of *Dulieu* v. *White*, where in spite of the decision of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*, the plaintiff was held entitled to recover for injuries resulting from a shock, though not caused by impact.

Ninth Edition. *Rawlinson's Municipal Corporation Acts.* By JOHN F. P. RAWLINSON, K.C., and J. A. JOHNSTON. London: Sweet and Maxwell. 1903.

The first edition of this well-known work was issued in 1842, after the passing of the first Municipal Corporations Act 1835. The last was published in 1883, and was rendered necessary by the passing of the Municipal Corporations Act 1882. In the something like twenty years which have elapsed since the issue of that, the eighth edition, no Municipal Acts of the same importance have come into force, but some twenty-seven new statutes have been passed relating to the powers and duties of Municipal Corporations, and some of these would certainly come within the definition of Municipal Corporations Acts contained in sect. 7 of the Act of 1882. It became then necessary for the learned Editors to deal with these new Acts in order to bring the work up to the required standard of efficiency. It is as well to notice at once, as is pointed out in the preface, the duties of Municipal Corporations dealt with are those that they possess under the said Acts "as distinguished from their functions as urban authorities under the Acts relating to Public Health." These last are not treated in this book. This is just as well, as there are already over 600 pages, without including the index and tables of contents, cases, &c. The book consists of two parts, the first, which takes up about a third of the whole, deals with the three Municipal Corporation Acts of 1882, 1883, and 1893. This is annotated with notes full of learning and practical knowledge, and references to cases, statutes, reports of Commissions, &c. Some of the longest notes are on the questions of qualification and elections.

The second Part contains statutes dealing with a very wide range of subjects, including some as dissimilar as Weights and Measures and Public Libraries. They are not all given in their totality, but only such parts as concern the object of the book, and explanations are added as to why so much is given or why there is not more, and as to how the statute is applicable. The last Act given is the Education Act 1902, but the notes on it are strictly limited to its effect on Local Government. The print is throughout good, and last, but not least, there is an exhaustive index.

Ninth Edition. *Company Precedents.* Part III.—Debentures and Debenture Stock. By F. BEAUFORT PALMER. London: Stevens & Sons. 1903.

This is the third part of Mr. Palmer's great work on Company. Precedents and is concerned entirely with debentures and debenture stock. No man is better qualified to speak about debentures and debenture stock than Mr. Palmer, for we have no doubt that he is correct in assuming that he is the legal parent of much of the vast mass of debentures and debenture stock in existence. In his preface he remarks on the astonishing development, in regard to debentures and debenture stock, which has taken place in the last forty years, which is largely due to the evolution "of the forms and securities best calculated to meet the practical wants of business men." He gives instances of what it has been found possible to effect by means of "suitable words," "apt words," and "proper provisions," and states with modest pride that "he has good reason to believe that by far the greater part of the debentures and debenture stock securities now outstanding are framed in close accordance with the forms designed and drafted by him for the various editions of *Company Precedents.*" We do not propose to do more than point out what Mr. Palmer's opinion is on a few controverted points, for detailed examination of such a work would be useless, as all who are concerned with Company Law know too well the value of Mr. Palmer's authority to require any confirmation of it by us. The first thirty-four chapters are given to disquisitions covering the whole natural history of the subject, and ranging from "What is a Debenture?" to "Stamp Duties." We notice that, in spite of the decision of Lindley, L.J., in *Bartlett* v. *Mayfair Property Co.*, the Author contends strongly "that there is nothing in the Act of 1879

to show that it was intended to negative the company's power to mortgage or charge the reserve capital."

It is interesting to notice that, in the case of *Government, etc., Stock Co.* v. *Manila Rail. Co.*, the clause about which the litigation arose was taken from the first edition of Mr. Palmer's book, and the question was whether the clause immediately following in the book, and which had been omitted, could be implied; and as the Author says: "If the omitted clause had been inserted, the decision would have been different." We should like to call attention to the strong dissent expressed at the practice of appointing either directors trustees of trust deeds, or the same persons trustees of two successive series of debentures, which dissent we think thoroughly justified. Another opinion on a point not free from difficulty is, whether so-called perpetual debentures are bad, as contravening the rule against perpetuities or clogging the equity of redemption. Mr. Palmer does not think the objection good in either case. There is a very instructive consideration of the important question of the negotiability of "Debentures to Bearer," and the learned Author defends Chief Justice Cockburn's judgment in *Goodwin* v. *Roberts* against some adverse criticisms, and approves cordially of the judgment of Kennedy, J., in *Bechuanaland Exploration Co.* v. *London Trading Bank*, and the extension of it by Bigham, J., in *Edelstein* v. *Schuler*. The rest of the book, over 500 pages, contains the precedents, something over 500 in number. These deal with all phases of the life of a debenture from its creation to its dissolution, and all proceedings to be taken by debenture holders for the protection of their security or to get their interest. These are annotated when necessary, and supply a collection indispensable to the Company Promoter, Director, and Lawyer.

Tenth Edition. *Principles of the English Law of Contract.* By Sir W. R. Anson, Bart. D.C.L. Oxford: Clarendon Press. 1903.

This is the best known of elementary text-books on Contract, for its learned Author claims no higher title for it, though we should be inclined to assign it a more ambitious position. It is not intended to compete with such elaborate works of practice and philosophy as Leake and Pollock, but its clearness of composition and definition, and the judicious selection of citations and illustrations, must render it not only invaluable to the student who has to face examination,

but valuable to his seniors who wish to get a clear grasp of some principle and to find it felicitously expressed. It does not enter into the scope of this work to criticise or compare cases; but it would seem as if the Author thought a little further authority were wanted before the decisions in the *Bechuanaland Case* and in *Edelstein* v. *Schuler & Co.* can be considered as absolutely settled law. It would have been interesting if in the chapter on "Impossibility of Performance" some reference had been made to the Coronation Seats cases, but as there are cases on the subject awaiting the decision of the Court of Appeal, perhaps the Author has left any reference to the subject for the next edition, which, judging by past experience, will probably appear before very many years have elapsed.

Eleventh Edition. *Smith's Leading Cases.* By T. WILLES CHITTY, J. HERBERT WILLIAMS, and HERBERT CHITTY, M.A. London: Sweet and Maxwell. 1903.

Few, if any, law books are better known and more read than Smith's Leading Cases. It is over sixty-five years since the first volume was published somewhat tentatively; to be followed by a second if it proved to be a success, and now the Eleventh Edition is before us. The First Edition was in 12mo., and contained about 1,000 pages in the two volumes; the present one is 4to, and has about double the number of pages. The great success it has attained is no doubt to be attributed to the great learning, ability, and grasp of principle of Mr. John William Smith, to the form of arrangement which he was the first to adopt if not the first to think of, and to the good fortune which has always granted it so competent and eminent Editors. Some alterations have been made in the grouping of the cases, and for this Edition the translation of the text of *Manby* v. *Scott* has been revised. A valuable addition to the note on *Carter* v. *Boehm* is given in the summary of the authorities, both English and American, on the controverted question as to the admissibility of insurance-broker's opinion on the materiality of facts not communicated to an underwriter, taken from the last Edition of *Arnould's Marine Insurance.* Although a certain number of the original cases have been from time to time omitted, we do not think more than three have been added, of which *Fletcher* v. *Rylands* is the latest. It would be an interesting speculation to consider the

claims of any cases for admission to this selection, but the previous Editors have not taken upon themselves to do so, and have confined their labours to considering and revising the notes by the light, and with the addition of the later cases; and in this careful revision the present Editors have worthily followed their distinguished predeeeessors.

Twelfth Edition. *Hints on Advocacy.* By RICHARD HARRIS, K.C. London: Stevens & Sons. 1903.

There is no royal road to advocacy, and no one, least of all Mr. Harris, would contend that it can be taught from a book. The experiences of a practical lawyer well arranged, and related in a bright and interesting style are, however, of great assistance towards acquiring such a mastery of the first principles of advocacy as can afterwards be developed indefinitely by carefully watching the conduct of other men's cases, and by the practice given from conducting one's own, if one is fortunate enough to have such practice. There are a large number of very useful hints for beginners as to arrangement, etc., and warnings as to the most dangerous pitfalls. We may give a few quotations to show the style of advice Mr. Harris gives—"In opening a case *moderation* is more forcible than exaggeration." "A short speech is more powerful than a long one." Then he gives a cardinal rule for examination-in-chief; "in examining a witness *the order of time ought always to be observed.*" There is some excellent advice as to cross-examination, concluding with a list of no less than twenty-one classes of witnesses, with suggestions for cross-examining them. We think, perhaps, he is a little too hard on the expert in handwriting. There is much else we might call attention to; such as the illustration cases; the analysis of Cockburn's opening speech in Palmer's trial; but it is better to advise those who wish to learn advocacy to read the book for themselves, and we will content ourselves with quoting one more piece of advice to the students: "In re-examination, as in cross-examination, after learning thoroughly *how to do it,* the next branch of learning to which the student had best direct his assiduous attention is—How not to do it."

CONTEMPORARY FOREIGN LITERATURE.

Étude Historique et Critique sur les Jeux de Bourse et Marchés à Terme. By EM. VERCAMER, Conseiller à la Cour mixte d'Alexandrie. Brussels and Paris, 1903.

This book contains a valuable historical and comparative examination of aleatory contracts from the Code of Justinian downwards, especially as they affect dealings on the Stock Exchange and produce markets. The effect produced on the reader is one of hopelessness that legislation can ever cope with the natural bent of man towards speculation. The book is very interesting, and its value is enhanced by an appendix containing many decisions of the Egyptian tribunals. As might be expected in the work of a foreign jurist, one or two of the references to English authorities are inaccurate, *e.g.*, 8 & 9 Victoria, c. 618 (p. 2), Sir John Bernard's Act (p. 5).

Étrangers et Protégés dans l'Empire Ottoman. By PIERRE ARMINJON, Avocat à la Cour d'Appel mixte, Professeur de Droit International à l'École Khediviale de Droit. Paris, 1903.

This is another very creditable work produced by the Egyptian Bar. The author speaks with authority, for he has exceptional means of obtaining first-hand knowledge of his subject. The position of Turkish authorities towards the unbeliever appears to be one of contemptuous toleration. If he be a *Kafir-Kitabi*, one whose faith is contained in a book, he is entitled to better treatment than the mere unlettered heathen. At p. 15 is an interesting account of the imitation of investiture by Mohammed II in 1453. No doubt he smoothed the path of conquest by adopting, as far as he could, the relation of the Greek Emperors to the Christian patriarchs and bishops.

Halbsouveränität. By DR. JUR. M. BOGHITCHÉVITCH. Berlin, 1903.

This is a painstaking and exhaustive sketch of "semi-sovereignty" and "suzerainty," from the point of view of jurisprudence, as illustrated by the Danubian Principalities, Servia, Bulgaria, Crete, Egypt, the Indian Native States, the South African Republic, and

other places.* As to the word "suzerainty," the learned author traces its history from the customs of the French provinces—it occurs in Brittany as early as 1456—down to its modern use in International law. This use appears to be a wresting of its original meaning. Feudal suzerainty required three persons—a seigneur, a vassal, and an *arrière* vassal; suzerainty, in its later and more inaccurate sense, requires only two. The relation of the Transvaal to Great Britain before the Peace of 1902 was, says the learned author, entirely anomalous. It was neither sovereign, semi-sovereign, nor a protectorate. Nor yet was it a *Staatsservitut*, with two international persons as *res dominans* and *res serviens* respectively, as some German jurists have thought. It may be noticed that one of the authorities cited is Mr. G. G. Phillimore's article on "British Sovereignty over the Transvaal" (*Law Magazine & Review*, 1899).

Delitto e Pena nel Pensiero dei Greci. By ALESSANDRO LEVI. Turin, 1903.

This is a prize essay from the University of Padua, but more worthy of notice than such essays generally are. It shows how in law, as in everything else, the past lives in the present. The Greek classics enjoy—in the words of Anatole France—*une immortalité mouvante.* The consequence is, that at times they become modern, and Lombrosism is but a reversion to the ancient theories of Nemesis, of racial degeneracy, of inherited tendency. Thersites illustrates that crime is physical. Œdipus was a criminal by circumstances and not by intention. Some modern writers will be found to assert that crime is environment. With Christianity, Nemesis no doubt existed, but it imported imputability; with writers who reject religion as a sanction, imputability is relegated to its old position, and the *liberum arbitrium* of scholastic doctors ceases, or ought to cease, to be an element in assigning responsibility. Contingency is nothing but necessity. The doctrines of the Civilians and the Canonists are obsolete, and we are to return to the Greeks for our principles of penology. Whether the reader agrees or disagrees with this view, Signor A. Levi's book will at least give him much matter for thought, and will be found of more than ordinary interest.

PERIODICALS.

Journal du Droit International Privé. 1903. Nos. III—VI. Paris.

The growing importance of the doctrine of *renvoi* is shown by the frequent discussion of the subject in Continental law books. An article by M. Ligeoix, of Poitiers, will be found at p. 483. Decisions of the Courts of Crete and Monaco will be found at pp. 678, 687. These are simply mentioned in order to show the wide field from which the *Journal* draws its material. There are interesting articles on the New York Bar and on the restrictions on immigration adopted by the United States and the Australian Commonwealth.

Deutsche Juristen-Zeitung. 1 April—15 June. Berlin.

These numbers contain little of interest to English readers, except perhaps articles on dramatic censorship (pp. 205 and 286). Much of the periodical is occupied with the discussion of points arising out of the Civil Code.

Giustizia Penale. 1 April—17 June. Rome.

This valuable periodical does not appear to have suffered from its recent change of Editor and is still one of the best digests of Criminal law existing. The question of compensation by the State to victims of judicial error seems to be arousing some attention in Italy just now.

Annali della Facoltà di Giurisprudenza. 1903. Vol. I, Part I. Perugia.

This is the beginning of a new series of a work which has been in existence some twenty years. The most interesting article contained in it is one on the *Mons Pietatis* of Perugia, which leads incidentally to a great deal of strange mediæval law as to usury, and to the citation of two hexameters of Bernardino of Siena which could hold their own with the worst of the period.

La Justice Internationale. 25 May, 1903. Paris.

Zeitschrift des Internationalen Anwalt-Verbandes. 15 May, 1903. Vienna.

Gazeta de Direito Administrativo. 10 Jan. 1903. Oporto.

These are all maiden numbers of new periodicals, to whom the *Law Magazine and Review* offers a hearty welcome. The French

one contains a very full account of the arbitration between the United States and Mexico on the question of the Californian *fondo piadoso*, the first case to come before the International Tribunal at the Hague. The Portuguese one has a digest of decisions, chiefly on electoral law and the powers of municipalities. The decision on p. 11, that a law imposing electoral disabilities is to be strictly interpreted, would no doubt be in accordance with English doctrine.

JAMES WILLIAMS.

Other books and publications received :—*Report of Parry v. Gollancz* (Sherratt and Hughes); *The Humanitarian; Civil Judicial Statistics, Part II; New Africa: An Essay on Government Civilization; The Beginnings of an Official European Code of Private International Law*, by S. E. Baldwin; Ruegg's *Employers' Liability;* Willis's *Workmen's Compensation Act; Encyclopædia of Forms and Precedents, Vol. III;* Brown's *Law of Enfranchisements and Commutations; The English Reports, Vols. XXVII and XXVIII;* Broughton's *Reminders for Conveyancers; Kerr on Injunctions;* Jemmett and Preston's *Law of Pleasure Yachts;* Mackenzie's *Law relating to Powers of Attorney and Proxies;* Short's *Ford on Oaths:* Jelf's *Fifteen Decisive Battles of the Law;* Scholefield and Hill's *Law of Settlement and Removal; Encyclopædia of the Laws of England, Vol. XIII (Supplement);* Mayer's *Law of Compensation; Anales Diplomaticos y Consulares de Colombia; Prison Industries* (Howard Association).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews, Juridical Review, Public Opinion, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Speaker, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Virginia Law Register, Albany Law Journal, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Westminster Review, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer* (India), *South African Law Journal, Columbia Law Review, Japan Register.*

